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Civil Docket
United States District Court

Jury demand date: EP 70 CA 134

D. C. FORM NO. 106 REV. **Ernest Guinn**

TITLE OF CASE

Felipe Juarez Hurtado,
Ramon Avila Hurtado,
Victor Gaucin Lazalde,
Enrique Gaucin Lazalde,
and Jorge (Sergio) Miranda Gaucin
individually and as members of a class.

VS.

The United States of America

ATTORNEYS

For plaintiff:
Albert Armendariz
of Armendariz and Armendariz
609 Myrtle
El Paso, Texas 79901

For defendant:
Ralph E. Harris
Assist. U. S. Atty.
P. O. Box 74
El Paso, Texas 79941

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk	7-14-70	62948	$15.00	
J.S. 6 mailed	Marshal	7-15-70	Transfer U.S. Treas. Lit.		$15.00
Basis of Action: Class Action Complaint for	Docket fee	4-26-71	69935	$5.00	
		4-30-71			$5.00
Witnesses' Fees	Witness fees				
Action arose at:	Depositions				

DATE	PROCEEDINGS	DATE ORDER JUDGMENT NO.
7-2-70	(1) Filed Complaint for Witnesses' Fees, in dup.	$15.00
7-7-70	Issued summons and copies.	
7-21-70	(2) Filed Ret. Summons, Ex. 7-16-70 at El Paso, Tex.	3.00
7-27-70	(3) Filed Pltfs' Interrogatories to Asist. U. S. Atty, in dup.	
9-15-70	(4) Filed Motion to Extend Time for Filing Answer of Deft., in dup.	
9-15-70	(5) Filed Order Granting Extension of Time for filing Deft's. answer, in dup. (Copies furnished counsel 9-21-)	
9-25-70	(6) Filed Answer of the U. S. A. to Complaint for Witnesses' Fees, in dup.	
9-25-70	(7) Filed Brief in Support of Government's Answer to Prohibit Maintenance of This Suit as A Class Action under Fed. Rule 23.	
9-30-70	(8) Filed Defendant's Objections to Interrogatories, in dup.	
10-26-70	(9) Filed Motion for Summary Judgment, in dup. (U.S.A.)	
10-26-70	(10) Filed Deft's. Brief in Support of Motion for Summary Judgment, in dup.	
11-12-70	(11) Filed Motion for a Period of Sixty Days Prior to Setting of Hearing on Motion for Summary Judgment, in dup.	
12-3-70	(12) Filed First Amended Complaint, in dup.	
12-14-70	(13) Filed Pltfs'. Cross Motion for Summary Judgment, in dup.	
12-14-70	(14) Filed Motion for Order under Rule 23(c) (1) and Order under 23(c) (2), in dup.	
12-14-70	(15) Filed Motion for an Order Calling A	

DATE		PROCEEDINGS	DATE ORDER JUDGMENT NO.
		Three-Judge Court, Title 28, Sec. 2282, 2284, in dup.	
12-14-70	(16)	Filed Motion for A Hearing on Written Interrogatories—Rule 33, F. R. C. P., in dup.	
12-14-70	(17)	Filed Plaintiffs' Brief, in dup.	
12-15-70	(18)	Filed Supplement Brief in Support of Gov's. Motion for Summary Judgment, in dup.	
12-14-70		Hearing in open court on various Motions. Pltfs' Motion for Appointment of 3-Judge Court Denied. All other motions to be submitted on briefs and rulings to be made later.	
4-8-71	(19)	Filed Order Overruling Motion to Designate A Three-Judge District Court, in dup. (Copies furnished counsel 4-9-71)	
4-8-71	(20)	Filed Judgment granting Defts'. Motion for Summary Judgment, in dup. (Copies furnished counsel 4-9-71)	
4-26-71	(21)	Filed Pltfs'. Notice of Appeal, in trip. (Copy mailed to U.S. Court of Appeals, 5th Circuit, 4-27-71)	
6-2-71	(22)	Filed Transcript of Proceedings	

[1]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE, ENRIQUE GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN individually and as members of a class, v. THE UNITED STATES OF AMERICA	No. EP-70-CA-134

COMPLAINT FOR WITNESSES' FEES—Filed: July 2, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Plaintiffs, FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE, ENRIQUE GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN, individually and as members of a class as hereinafter alleged claiming against the United States of America and allege as follows:

I.

That this court has jurisdiction over the parties and the subject matter under Title 28, U.S.C., Section 1346 (a) (2), in that each Plaintiff and each member of the class hereinafter alleged is claiming a sum of money from the United States not in excess of the sum of ten thousand dollars ($10,000.00). That such claim is each case is based on an Act of Congress, to wit, Title 28 U.S.C. 1821.

II.

[2] That your Plaintiffs are aliens and residents of a foreign country the majority from Mexico members of a class of persons in that they are or have been incarcerated pursuant to rule 46 (b) of the Federal Rules of Criminal Procedure as material witnesses. That their numbers are

so numerous as to make it impracticable or impossible to join each of them as Plaintiffs herein and to bring each of them before this court. That the named representatives will fairly insure the adequate representation of all of the class. That the number of persons held as material witnesses in this district since Title 28, U.S.C. 1821 was amended is in the hundreds if not thousands. That the interest of each such person is consonant with the interest of the other and in nowise conflicting and that a class action is available to them under Rule 26 (b) (2) of the Federal Rules of Civil Procedure.

III.

Plaintiff FELIPE JUAREZ HURTADO and RAMON AVILA HURTADO allege that from the 25th day of March 1970 to the 19th day of June of the same year they were incarcerated in the El Paso County Jail as material witnesses in lieu of bond in a Criminal action filed in this District Court. Plaintiffs VICTOR GAUCIN LAZALDE, ENRIQUE GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN are now and have been for the past two weeks incarcerated in the same jail for the same reason. That there are approximately fifty members [3] of this class so incarcerated in said jail at this time.

IV.

Plaintiffs allege that Title 28 U.S.C. 1821 applies to them and to each member of the class and reads, in pertinent part, as follows:

> "A witness attending in any Court of the United States, or before any person authorized to take his deposition pursuant to any rule of order of a Court of the United States, shall receive $20.00 for each day's attendance and for the time necessarilly occupied in going to and returning to his place of residence. . . . Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an

additional allowance of $16.00 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance. . .

. . . . .

[4] When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1.00 per day."

V.

Plaintiffs allege that as material witnesses they were attending to this court while incarcerated and subject to its orders and were and are entitled to be paid the sum of twenty dollars ($20.00) per day during such detention. That in addition to the said sum of twenty dollars for such court attendance, the Plaintiffs and each member of their class are entitled to additional subsistence payment as provided for in said statute plus the sum of one dollar ($1.00).

VI.

That the statute quoted in paragraph IV above has been interpreted by the United States Attorney in this district to require the payment of only one dollar per day to your Plaintiffs and members of the class. That pursuant to this policy in interpretation your Plaintiffs FELIPE JUARES HURTADO and RAMON AVILA HURTADO were paid the sum of one dollar per day of incarceration as were all and each member of the class paid upon their release. That the Plaintiffs VICTOR GAUCIN LAZALDE, JORGE (SERGIO) MIRANDA and all members [5] of the class still incarcerated will be paid the sum of one dollar per day upon release.

VII.

Plaintiffs allege that the least that each is entitled to under this statute is to his per diem payment of twenty dollars plus the sum of one dollar because of the fact that he is and has been detained. Plaintiffs would urge the court, however, that if the statute prevents the payment of sixteen dollars to your Plaintiffs or if it is so interpreted and applied, it is unconstitutional in that it allows payment of

subsistence to witnesses who are not incarcerated, but does not allow such payment to witnesses who are incarcerated the equal protection of the law.

VIII.

In the alternative, if the Statute, 28 U.S.C. Section 1821, in in and of itself is as interpreted and applied, provides for the payment of only one dollar ($1.00) to material witnesses who are incarcerated in lieu of bond, and no more, as the government contends, that statute, both on its face and as interpreted and applied, is contrary to the Constitution of the United States in that it deprives the Petitioner and all of the members of the class which they represent of their liberty and their livelihood without due process of law and without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

IX.

[6] The Statute is and of itself or as interpreted and applied in providing for the incarceration of material witnesses in lieu of a bond with the payment of only one dollar per day amounts to illegal and involuntary servitude, slavery based on ethnic discrimination as to each Plaintiff and member of the class in contravention of the Constitution of the United States and the Thirteenth Amendment, thereof.

X.

In the alternative, if the statute on its face or as interpreted and applied, provides for the payment of only one dollar ($1.00) per day to material witnesses who are incarcerated that statute is unconstitutional and void insofar as it deprives the Petitioners and all of the members of the class which they represent the equal protection of the laws, and therefore due process of law, in contravention of the Fifth Amendment of the Constitution of the United States, in that it provides for the payment of as much as thirty six ($36.00) dollars per day for witnesses who are waiting to be called to testify in the comfort of their hotel room while it provides for only one dollar per day to those

deprived of their freedam who are waiting for the same thing and for the same reason in the county jail.

XI.

The statute as interpreted is, therefore, void on its [7] face and as applied, and Petitioners and all of the members of the class which they represent are entitled to just compensation for the time they have spent and will spend in jail as material witnesses. Petitioners allege that the amount of Thirty Seven Dollars ($37.00) per day is just compensation which each and all of the members of the class should receive for each day of this incarceration.

XII.

That your Plaintiffs have agreed with the undersigned attorneys for themselves and on behalf of the class that the attorneys shall receive for representation of the Plaintiffs and the class, one third of each claim in the aggregate and that the court should order the payment direct to such attorneys of said attorney's fees.

WHEREFORE, premises considered, Plaintiffs pray for service upon the United States of America as provided for by Statute 28 U.S.C., Section 1821 of the Rules of Civil Procedure and as this complaint be accepted as a class action on behalf of the Plaintiffs and the class they represent and that your Plaintiffs and each member of the class be declared entitled to the sum of Thirty Seven Dollars ($37.00) per day during that incarceration and at least the sum of Twenty One Dollars ($21.00) per day during such incarceration. That the United States of America be required to give the names, addresses, [8] and periods of incarceration of all witnesses in this district so incarcerated and who would be members of the class so that the Court may determine the extent of the indebtedness to each member of the class and that the court order the United States of America to pay the attorneys herein, attorney's fees, equivalent to one third of each such claim in the aggregate and that the Court order such sum to be paid to your Plaintiffs, which class they represent and to their attorneys and for such

further relief in law and in equity that they may be justly entitled to.

ARMENDARIZ AND ARMENDARIZ
Attorneys at Law
/s/ Albert Armendariz Sr.

* * * * *

INTERROGATORIES—Filed: July 27, 1970

TO: Assistant United States Attorney
For The Western District of Texas
El Paso, Texas

Plaintiff's attach a list (names, United States Immigration and Naturalization Identification Number, and date of [9] commitment of each person) and request that the Defendant UNITED STATES OF AMERICA answer under oath the following questions as to each person named in said list in accordance with Rule 30 of the Federal Rules of Civil Procedure:

1. Is the date of commitment correct?
2. What is the date of release?
3. Did this person actually testify in Court? If so when and for how long?
4. What amount of money was this person paid for his detention?
5. What part of the sum inquired into in question #4 was at the rate of Twenty Dollars ($20.00) per day for actual giving of testimony in Court?
6. What is the home address of this person as given by him to the Immigration Authorities and shown of record?
7. Are witnesses subpoenaed in this jurisdiction to appear on behalf of the United States Government paid Twenty Dollars ($20.00) per day while waiting to testify in the case for which they are called regardless of whether they actually testify in Court or not?
8. Are subpoenaed witnesses who travel a required distance paid Sixteen Dollars ($16.00) per day [10] subsistance whether they actually testify in Court or not?

9. Are there any persons not included in the above list who are or have been committed as material witnesses in lieu of bond under Rule 46 (b) of the Federal Rules of Civil Procedure? If so, give the name, identification number, and date of commitment.
10. Answer interrogatories 1-6 above as to each person added to the list in answer to question 9.

Please take notice that a copy of such answers must be served upon the undersigned within 30 days after the service of these interrogatories.

ARMENDARIZ & ARMENDARIZ
Attorneys at Law
609 Myrtle
El Paso, Texas 79901

MATERIAL WITNESSES,

Name	Imm. & Nat. I.D. No.	Date Committed
Hipolito Delgado-Bailon	A18 408 178	7-1-70
Rafael Delgado-Bailon	A19 030 671	7-1-70
Raul Valadez-Vega	A19 030 950	6-17-70
Daniel Quirarte-Correa	A19 030 959	6-17-70
Aniceto Carranza-Ruiz	A19 030 951	6-17-70
Roberto Castaneda-Morales	A19 030 953	6-17-70
Antonio Ramirez-Martinez	A19 030 737	6-17-70
Ladislao Carmona-Avila	A19 030 738	6-17-70
Eutemio Gaytan-Baeza	A19 030 739	6-17-70
Enrique Torres-Silva	A19 030 736	6-17-70
Lamberto Barraza-Saenz	A19 030 707	6-17-70
Gerardo Lucero-Valenzuela	A14 578 416	6-17-70
Antonio Najera-Cobos	A19 030 703	6-17-70
Eluterio Nevarez-Quiroga	A19 030 088	6-5-70
Angel Barraza-Calvo	A19 030 098	6-5-70
Jose Fernandez-Delgado	A19 030 084	6-5-70
Raymundo Solis-Calvo	A19 030 096	6-5-70
Antonio Carrasco-Calvo	A19 030 094	6-5-70
Albino Calvo-Salazar	A19 039 092	6-5-70
Juan Francisco Herrera-Terrazas	A19 030 058	6-5-70
Jose Valenzuela-Sota	A19 030 352	6-11-70
Israel Martinez-Salgado	A19 030 351	6-11-70
Juan Manuel Alatorre-Perez	A19 030 350	6-11-70
Jorge Miranda-Gaucin	A19 030 359	6-11-70
Enrique Gaucin-Lazalde	A19 030 358	6-11-70
Victor Gaucin-Lasalde	A19 030 360	6-11-70
Florentino Aguirre-Alamo	A19 030 359	6-11-70
Miguel Angel Olguez-Garcia	A19 030 063	6-11-70
Jesus Diaz-Quiroga	A19 030 015	6-11-70
Angel Nava-Avalos	A19 030 014	6-11-70
Onesimo Nevarez-Gutierrez	A19 030 380	6-11-70
Carmelo Rivas-Carrasco	A19 030 379	6-11-70
Adalberto Portillo-Pineda	A19 030 377	6-11-70
Rene Maynez-Hernandez	A19 030 381	6-11-70
Carlos Perez-Marquez	A19 030 374	6-11-70
Roberto Aragon-Galarza	A19 030 245	6-4-70
Juan Morales-Garcia	A19 030 247	6-4-70

Name	Imm. & Nat. I.D. No.	Date Committed
Rafael Saldana-Escobar	A19 030 246	6-4-70
Jesus Garcia-Lopez	A19 030 260	6-4-70
Francisco Ruiz-Zamudia	A19 030 257	6-4-70
Emilio Andrade-Valdez	A19 030 258	6-4-70
Jose Magana-Sanchez	A19 030 216	5-27-70
Efren Brisuela-Magana	A19 030 214	5-27-70
Antonio Hernandez-Lopez	A19 030 213	5-27-70
Elias Herrera-Munoz	A19 030 220	5-27-70
Elias Perales-Cardoza	A19 030 221	5-27-70
Apolinar Mora-Garcia	A19 030 159	5-27-70
Jaime Chavez-Madera	A19 030 157	5-27-70
Jorge Rosales-Moran	A19 028 091	5-27-70
Tito Mireles-Nanes	A19 030 036	5-27-70
[12]		
Ramon Sandoval-Javalera	A19 030 032	5-27-70
Raquel Villalobos-Alderete	A19 030 034	5-27-70
Manuel Ruiz-Rios	A19 029 069	5-27-70
Heriberto Berumen-Galindo	A19 029 071	5-27-70
Emilio Posado-Contreras	A19 029 067	5-27-70
Juan Manuel Gonzalez-Avalos	A19 028 274	5-27-70
Manuel Urbina-Terrazas	A19 030 178	5-27-70
Guadalupe Pineda-Diaz	A19 030 173	5-27-70
Gabriel Lucero-Diaz	A19 030 175	5-27-70
Felix Leyva-Luna	A19 030 174	5-27-70
Guadalupe Vargas-Sales	A19 030 179	5-27-70
Amelia Armendariz-Villalobos	A19 030 399	5-27-70
Arturo Fuentes-Caro	A19 029 004	5-18-70
Salvador Romero-Romero	A19 029 002	5-18-70
Jose Felix-Belmontes	A19 029 554	5-7-70
Ruben Ruiz-Palma	A19 029 557	5-7-70
Serafin Garcia-Munoz	A19 029 556	5-7-70
Jose Teno-Baldioso	A19 029 555	5-7-70
Edmundo Soto-Medina	A19 029 091	5-7-70
Oscar Soto-Medina	A19 029 093	5-7-70
Jorge Munoz-Grado	A19 029 551	5-7-70
Fidel Banuelos-Lara	A19 029 552	5-7-70
Edmundo Munez-Bustamante	A19 029 553	5-7-70
Jose Herrera-Martinez	A19 029 579	4-17-70
Alberto Valenzuela-Martinez	A19 029 423	4-14-70

Name	Imm. & Nat. I.D. No.	Date Committed
Manuel Lopez-Alvarez	A19 029 424	4-14-70
Edgar Mario Soto-Mata	A19 027 894	2-2-70
Francisco Zea-Galvan	A19 027 895	2-2-70
Ricardo Hinostroza-Parra	A19 027 896	2-2-70
Maria de Jesus Alvarez de Campos	A19 026 042	12-2-69
Panfilo Carrillo-Rios	A19 025 402	10-27-69
Rafael Herrera-Hernandez	A19 025 436	10-27-69
Lorenzo Lopez-Gallardo	A19 025 401	10-27-69
Ernesto Reyes-Barrios	A19 025 437	10-27-69
Ramon Ruiz-Sanchez	A19 024 699	10-27-69
Manuel Saucedo-Olivas	A19 025 438	10-27-69
Luis Nunez-Hernandez	A14 252 462	10-13-69
Manuel Vargas-Guerrero	A19 024 673	10-7-69
Raul Majalca-Duarte	A19 024 672	10-7-69
Gerardo Ayala-Ayala	A19 024 674	10-7-69
Prudencio Quintana-Sanchez	A19 024 578	10-6-69
Ramon Quintana-Sanchez	A19 024 529	10-6-69
Santiago Torres-Quintana	A19 924 577	10-6-69
Francisco Bueno-Tarango	A19 024 583	10-6-69
Alejo Vargas-Ramirez	A19 024 613	10-6-69
Jesus Aguirre-Ramirez	A19 024 616	10-6-69
Jose Ramirez-Ochoa	A19 023 612	10-6-69
Francisco Gonzalez-Porras	A19 023 091	10-1-69
Natividad Cavada-Ultreras	A19 023 089	10-1-69
Jose German Romero-Porras	A19 023 093	10-1-69
Andres Serna-Nieves	A19 024 503	9-26-69
Rosendo Serna-Villalpando	A19 024 502	9-26-69
Cleofo Gomez-Flores	A19 024 193	9-26-69
Atanacio Perez-Diaz	A19 024 250	9-23-69
Cipriano Perez-Rivera	A19 024 251	9-23-69
Arcadio Diaz-Ortiz	A19 022 736	9-23-69
[13]		
Jose Urbina Villanueva	A19 022 733	9-23-69
Ramon Rocha-Burciaga	A19 022 735	9-23-69
Celestino Quinones-Chavez	A19 022 734	9-23-69
Manuel Soto-Bencomo	A19 024 130	9-23-69
Juan Reyes-Villa	A19 024 134	9-23-69
Miguel Rangel-Perez	A19 024 133	9-23-69
Arturo Alvarado-Fernandez	A19 023 799	9-16-69

Name	Imm. & Nat. I.D. No.	Date Committed
Teofilo Alvarado-Fernandez	A19 023 798	9-16-69
Angel Salazar-Medrano	A19 023 797	9-16-69
Juan Montes-De La Cruz	A19 024 112	9-18-69
Pedro Gallegos-Gallegos	A19 023 720	9-15-69
Leopoldo Marin-Marin	A19 023 723	9-15-69
Pablo Ortega-Sandoval	A19 023 754	9-12-69
Mateo Sandoval-Rodriguez	A19 023 755	9-12-69
Antonio Ortega-Perez	A19 023 755	9-12-69
Federico Araujo-Lomeli	A19 023 921	9-2-69
Feliciano Mendoza-Almendarez	A19 023 922	9-2-69
Santos Rodriguez-Jacobo	A19 023 924	9-2-69
Salome Rodriguez-Larez	A19 023 923	9-2-69
Elizar Burciaga-Diaz	A19 023 383	8-28-69
Maximino Gonzalez-Ortiz	A19 023 382	8-28-69
Ambrosio Diaz-Villa	A19 023 384	8-28-69
Heriberto Diaz-Villa	A19 023 380	8-28-69
Jose Villa-Dominguez	A19 023 395	8-28-69
Roberto Moreno-Escarcega	A19 023 394	8-28-69
Manuel Salgado-Moncayo	A19 023 393	8-28-69
Oscar Humberto Almanza-Sanchez	A19 023 392	8-28-69
Demecio Gonzalez-Guerrero	A19 022 708	8-27-69
Juan Ruiz-Ruacho	A19 022 707	8-27-69
Jose Escobar-Barrazas	A19 022 706	8-27-69
Daniel Monreal-Monreal	A19 021 024	8-25-69
Alicia Gamboz-Nevarez	A19 023 373	8-25-69
Pedro Ontiveros-Puente	A19 021 026	8-25-69
Antonio Sanchez-Soto	A19 023 464	8-20-69
Leopoldo Lechuga-Lechuga	A19 023 463	8-20-69
Pablo Nevarez-Bustamante	A19 023 462	8-20-69
Fabian Favela-Rivera	A19 023 461	8-20-69
Pedro Franco-Molina	A19 021 187	8-19-69
Amancio Rodriguez-Cisneros	A19 021 188	8-19-69
Angel Villegas-Urives	A19 021 186	8-19-69
Luis Hernandez-Orozco	A19 021 043	8-12-69
Arcadio Cera-Marquez	A19 021 045	8-12-69
Jose Morales-Martinez	A19 021 947	8-12-69
Sergio Martinez-Cruz	A19 022 835	8-11-69
Sabino Mares-Luna	A19 022 840	8-11-69
Angel Gutierrez-Camuzano	A19 022 812	8-11-69

Name	Imm. & Nat. I.D. No.	Date Committed
Juan Garcia-Alcibor	A19 022 811	8-11-69
Juan Majia-Magalde	A19 021 031	8-11-69
Macario Campuzano-Villalobos	A19 543 490	8-11-69
Guadalupe Ochoa-Dorado	A19 022 214	8-4-69
Roque Marquez-Marquez	A19 022 217	8-4-69
Reynaldo Frausto-Barboze	A19 022 215	8-4-69
Benjamin Hernandez-Castaneda	A19 021 065	7-31-69
Otilio Perez-Arellano	A19 021 061	7-31-69
Porfirio Sifuentes-Molina	A19 021 063	7-31-69
Doneciano Rosales-Guzman	A18 408 736	7-25-69
Alejo Rosales-Avila	A18 408 735	7-25-69
Fernando Diaz-Gomez	A18 408 733	7-25-69
[14]		
Apolinar Torres-Chairez	A19 022 180	7-24-69
Magdaleno Gil-Salinas	AL9 022 182	7-24-69
Ruben Arroyo-Paz	AL9 022 181	7-24-69
Ramon Torres-Becerra	A19 022 184	7-24-69
Juan Martinez-Torres	A19 022 185	7-24-69
Gabriel Burciaga-Castro	AL9 022 183	7-24-69
Leonardo Loya-Miramontes	A19 021 137	7-15-69
Lesus Loya-Miramontes	A19 021 136	7-15-69
Agustin Gonzalez-Hernandez	A19 022 072	7-15-69
Manuel Moreno-Granillo	A17 888 200	7-9-69
Rosendo Chavira-Salcido	A17 888 137	7-9-69
Librado Zubia-Salcido	A17 888 135	7-9-69
Benjamin Enriquez-Paez	A19 021 829	7-8-69
Antonio Trujillo-Prieto	A19 021 828	7-8-69
Nicolas Trujillo-Landeros	A19 021 827	7-8-69
Monico Ramirez-Rubio	A19 021 116	7-2-69
Jose Paniagua-Quintana	A19 021 119	7-2-69
Eduardo Aguilera-Corral	A19 021 117	7-2-69
Vicente Mejorada-Soto	A19 021 115	7-2-69
Meliton Meraz-Quinones	A19 021 120	7-2-69
Pablo Gomez-Gomez	A18 447 358	6-24-69
Vicente Garay-Felix	A17 930 629	6-24-69
Pilar Perez-Gomez	A18 447 357	6-24-69
Felix Escarsega-Molinar	A19 021 511	6-24-69
Carlos Teran-Rodriguez	A19 021 514	6-24-69
Alfredo Parra-Falson	A19 021 513	6-24-69

Name	Imm. & Nat. I.D. No.	Date Committed
Gilberto Gonzalez-Gandara	A19 021 512	6-24-69
Anastacio Sandoval-Valenzuela	A18 408 145	6-3-69
Patrocinio Aguilar-Alvarez	A18 408 148	6-3-69
Antonio Armendariz-Ceniceros	A17 889 591	5-29-69
Melecio Garcia-Sanchez	A17 889 585	5-29-69
Francisco Pinon-Porras	A17 889 595	5-29-69
Magdaleno Portillo-Rodella	A17 889 587	5-29-69
Simon Villanueva-Carreon	A17 889 593	5-29-69
Cruz Isaac Creceres-Benitez	A17 889 589	5-29-69
Manuel Robles-Robles	A18 408 024	5-29-69
Manuel Venegas-Acevedo	A18 408 025	5-29-69
Gonzalo ReyesMartinez	A18 408 026	5-29-69
Juan Ramirez-Almansa	A19 016 942	5-23-69
Rafael Vera-Mendoza	A17 890 362	5-23-69
Manuel Martinez	A17 890 360	5-23-69
Jesus Linares-Sierra	A17 890 361	5-23-69
Ascencion Vega-Calzada	A17 890 351	5-19-69
Maximo Tinajero-Vega	A17 890 358	5-19-69
Ricardo Reyes-Ruiz	A17 890 357	5-19-69
Manuel Parra-Martinez	A14 114 465	5-19-69
Monserrat Gutierrez-Campos	A17 890 346	5-19-69
Emeterio Dominguez-Baca	A17 890 345	5-19-69
Carmen Saenz-Carta	A17 890 347	5-19-69
Edmundo Beltran-Olvera	A17 889 574	5-7-69
Reme Rodriguez-Rascon	A17 889 572	5-7-69
Octavio Rodriguez-Ramos	A17 889 568	5-7-69
Ernesto Castillo-Legarda	A17 889 566	5-7-69
Vicente Ortega-Sandoval	A17 889 668	5-2-69
Jesus Alcantara-Cervantes	A17 889 669	5-2-69
Guadalupe Alcantara-Covarrubias	A17 889 671	5-2-69
[15]		
Jose Lara-Lopez	A17 889 648	4-30-69
Jesus Garcia-Alvarez	A17 889 649	4-30-69
Manuel Garcia-Alvarez	A17 889 650	4-30-69
Monico Cabral-Alamillo	A17 889 607	4-25-69
Antonio Gonzalez-Salazar	A17 140 898	4-25-69
Ruben Alamillo-Solis	A17 889 606	4-25-69
Humberto Martinez-Acosta	A17 889 187	4-14-69
Ramon Castillo-Ramos	A17 889 113	4-14-69

Name	Imm. & Nat. I.D. No.	Date Committed
Jesus Torres-Torres	A17 889 138	4-14-69
Rogelio Chavez-Sandoval	A17 889 091	4-11-69
Elias Javalera-Medina	A17 889 090	4-11-69
Dolores Chavez-Sanchez	A17 140 777	4-11-69
Refugio Palma-Saens	A17 889 032	4-10-69
Fermin Rodriguez-Gonzalez	A17 889 033	4-10-69
Guillermo Medrano-Diaz	A17 889 034	4-10-69
Jose Angel Mercado-Rodriguez	A14 545 772	4-8-69
Belizario Rivera-Rodriguez	A17 886 395	4-8-69
Agustin Mesta-Villa	A17 886 393	4-8-69
Benjamin Ibarra-Rodriguez	A17 886 391	4-8-69
Nicasio Miranda-Moreno	A17 888 108	4-8-69
Jose Martinez-Martinez	A17 888 110	4-8-69
Adolfo Armendariz-Prieto	A17 888 114	4-8-69
Pedro Alcala-Cervantes	A17 888 584	4-2-69
Jose Barajas-Villalobos	A17 888 582	4-2-69
Jose Barajas-Sanchez	A17 888 583	4-2-69
Jose de Jesus Lopez-Rosales	A17 888 176	4-1-69
Manuel Martinez-Ruiz	A17 888 178	4-1-69
Demetrio Martinez-Ruiz	A17 888 174	4-1-69
Fidel Garcia-Herrera	A10 728 961	3-28-69
Tomas Perez-De La Cruz	A17 888 899	3-28-69
Carmen Villafuerte-Garcia	A17 888 900	3-28-69
Rogelio Ramos-Vevarez	A17 888 894	3-28-69
Eduardo Rodelas-Garcia	A17 888 895	3-28-69
David Gomez-Munoz	A17 888 865	3-27-69
Antonio Vasquez-Alvarado	A17 888 864	3-27-69
Refugio Gomez-Munoz	A17 888 863	3-27-69
Primitivo Bustamante-Medina	A17 888 898	3-27-69
Luis Sauzameda-Lopez	A17 888 823	3-26-69
Adolfo Sauzameda-Lopez	A17 888 824	3-26-69
Isaias Flores-Sauzameda	A17 888 822	3-26-69
Maria De La Cruz Olvera-Salazar	A17 888 870	3-26-69
Fernando Perez-Rodriguez	A17 886 341	3-24-69
Jesus Garcia-Garcia	A17 886 339	3-24-69
Juan Rodriguez-Castillo	A17 888 552	3-24-69
Gonzalo Hernandez-Martinez	A17 888 554	3-24-69
Zenon Rodriguez-Castillo	A17 888 551	3-24-69
Ubaldo Tarango-Garay	A14 122 880	3-21-69

Name	Imm. & Nat. I.D. No.	Date Committed
Roberto Ruiz-Hernandez	A17 888 040	3-21-69
Alberto Marquez-Aldaz	A17 888 036	3-21-69
Saul Prieto-Alvarez	A17 888 037	3-21-69
Elizardo Priedo-Alvarez	A17 888 039	3-21-69
Julian Gomez-Nieto	A17 886 160	3-21-69
Refugio Herrera-Jordan	A14 538 954	3-21-69
Fernando Hernandez-Gonzalez	A17 888 099	3-21-69
Albino Hernandez-Gardea	A17 887 799	3-21-69
Jesus Rodriguez-Chavez	A17 887 800	3-21-69
[16]		
Francisco Bustos-Duenos	A17 887 755	3-18-69
Antonio Rodriguez-Lopez	A17 887 752	3-18-69
Jesus Batres-Acosta	A17 887 169	2-26-69
Eliseo Medina-Villanueva	A17 887 164	2-26-69
Manuel Villanueva-Sanchez	A17 887 165	2-26-69
Remedios Del Violar-Escajeda	A17 887 166	2-26-69
Juan Romero-Gonzalez	A17 887 669	2-26-69
Martin Alvarado-Alvarado	A17 887 667	2-26-69
Jesus Rojo-Valenzuela	A17 887 299	2-24-69
Luis Mendoza-Maldonado	A17 887 296	2-24-69
Delfino Gutierrez-Avila	A17 887 167	2-17-69
Simon Cuellar-Valenzuela	A17 887 168	2-17-69
Amador Gutierrez-Peregrino	A17 886 336	2-11-69
Felix Gutierrez-Morales	A17 886 338	2-11-69
Jesus Mata-Gutierrez	A17 886 340	2-11-69
Juan Fierro-Rodriguez	A17 886 342	2-11-69
Jose Ontiveros-Salas	A17 887 146	2-11-69
Juan Martinez-Perez	A17 887 145	2-11-69
Aniceto Catarino-Reyes	A17 887 143	2-11-69
Perfecto Tobanchi-Tobanchi	A17 887 144	2-11-69
Victor Martinez-Rodriguez	A17 886 316	2-4-69
Roberto Gomez-Hernandez	A17 886 310	2-4-69
Valentino Hernandez-Ramirez	A17 886 308	2-4-69
Gregorio Madera-Duarte	A17 886 312	2-4-69
Jaime Zamora-Sosa	A17 886 314	2-4-69
Luis Campos-Hernandez	A17 887 034	2-4-69
El pidio Molina-Hernandez	A17 887 032	2-4-69
Antonio Moreno-Andrade	A17 886 560	1-27-69
Mateo Rodriguez-Ramos	A17 886 573	1-27-69

Name	Imm. & Nat. I.D. No.	Date Committed
Cosme Mendoza-Aguirre	A17 886 561	1-27-69
Javier Garcia-Baltazar	A17 886 573	1-27-69
Bascual Alvarado-Garcia	A17 886 564	1-27-69
Andres Cisneros-Garcia	A17 886 566	1-27-69
Javier Cisneros-Garcia	A17 886 568	1-27-69
Cruz Campos-Padilla	A17 886 414	1-23-69
Ignacio Ravelo-Reyes	A14 541 852	1-22-69
Juan Garcia-Garcia	A13 048 831	1-22-69
Silvestre Gonzalez-Munoz	A17 886 518	1-22-69
Fernando Luevano-Pinon	A17 886 517	1-22-69
Sacramento De La Cruz-Campos	A17 886 438	1-16-69
Gonzalo Olaguez-Ortiz	A17 886 442	1-16-69
Roberto Velasquez-Lechuga	A17 886 434	1-16-69
Apolonio Olaguez-Martinez	A17 886 432	1-16-69
Manuel Urbina-Meraz	A17 884 383	12-30-68
Jose Inez Rocha-Ojeda	A17 884 385	12-30-68
Antelmo Astorga-Malero	A17 884 387	12-30-68
Lamberto Astorga-Garcia	A17 884 379	12-30-68
Artemio Melero-Gonzalez	A17 169 676	12-30-68
Claudio Rivera-Rosales	A17 888 653	4-18-69
Manuel Medina Diaz	A17 888 641	4-18-69
Roberto Gonzalez-Gonzalez	A17 888 652	4-18-69
Francisco Guzman-Rodriguez	A17 886 317	4-18-69

[17]

* * * * *

ANSWER OF THE UNITED STATES OF AMERICA TO COMPLAINT FOR WITNESSES' FEES —Filed: September 25, 1970

Now comes the United States of America, by and through its United States Attorney for the Western District of Texas, and in answer to plaintiffs' Complaint for Witnesses' Fees, would state as follows:

I.

United States of America admits the allegations contained in Paragraph I of plaintiffs' Complaint.

II.

Defendant admits that plaintiffs, Felipe Juarez Hurtado, Ramon Avila Hurtado, Victor Gaucin Lazalde, Enrique Gaucin Lazalde, and Jorge (Sergio) Miranda Gaucin are citizens of Mexico and that they have been held as material witnesses in pending criminal cases pursuant to Rule 46 (b), Federal Rules of Criminal Procedure.

As to other persons mentioned in Paragraph II of plaintiffs' Complaint, defendant has no knowledge and, therefore, neither admits nor denies the remaining allegations contained in Paragraph II. But the United States does specifically deny that this suit is the proper subject for a class action. [18] The mere allegation of multiple parties will not in and of itself justify a class suit. But rather the propriety of a class action depends upon the circumstances surrounding the case and there must be a positive showing of such circumstances.

III.

Defendant admits that Felipe Juarez Hurtado and Ramon Avila Hurtado were held as material witnesses upon their failure to post bond in the case of *United States of America* v. *Santos S. Casares and Tomas Lopez,* P-70-CR-55. This case was a criminal prosecution of Casares and Lopez for their illegal transportation of Felipe Juarez Hurtado and Ramon Avila Hurtado who were aliens ille-

gally in the country at the time and who had entered the country illegally.

Defendant also admits that Victor Gaucin Lazalde, Jorge (Sergio) Miranda Gaucin and Enrique Gaucin Lazalde were held as material witnesses upon their failure to post bond in the case of *United States of America* v. *Abe Herrera*, EP-70-CR-537. This case was a criminal prosecution of Abe Herrera for aiding and abetting the illegal entry of the above named witnesses who were aliens.

IV.

Defendant admits that 28 U.S.C. § 1821 is determinative of the compensation to be received by plaintiffs in this cause.

V.

[19] Defendant denies the allegations contained in Paragraph V of plaintiffs' Complaint.

VI.

Defendant admits that the United States Attorney has paid the named plaintiffs pursuant to the provisions of 28 U.S.C. § 1821 and will continue to do so.

VII.

Defendant denies the allegations contained in Paragraph VII of plaintiffs' Complaint.

VIII.

Defendant denies the allegations contained in Paragraph VIII of plaintiffs' Complaint.

IX.

Defendant denies the allegations contained in Paragraph IX of plaintiffs' Complaint.

X.

Defendant denies the allegations contained in Paragraph X of plaintiffs' Complaint.

XI.

Defendant admits that the named plaintiffs are entitled to just compensation provided by 28 U.S.C. § 1821 and have received or will receive just compensation as provided by said statute.

[20] Defendant denies all other allegations contained in Paragraph XI of plaintiffs' Complaint.

XII.

Defendant does not have sufficient information either to admit or deny the allegations contained in Paragraph XII. Defendant alleges, however, that 28 U.S.C. § 2678 provides that:

> "Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both."

Defendant would show the Court that under the provisions of 28 U.S.C. § 2678 the maximum attorney's fees which may be awarded an attorney in any judgment rendered pursuant to 28 U.S.C. § 1346(b) is 25 per cent, and the matter of attorneys fees for plaintiffs is controlled by the provisions of 28 U.S.C. § 2678.

XIII.

Defendant alleges that its United States Attorney has interpreted 28 U.S.C. § 1821 to mean that when a witness is in attendance in court or before a United States Commissioner or before any person authorized to take his deposition pursuant [21] to any rule or order of a court of the United States, he will receive $20 each day of attendance and for the time necessarily occupied in going to and returning from the court, plus ten cents per mile for going from and returning to his place of residence. In addition, those witnesses who are in attendance at points so far removed from their respective residences as to prohibit return thereto from day to day receive an additional allowance of $16 per day as expenses of subsistance while necessarily in attendance in court.

Witnesses who are salaried employees of the United States Government or who are in custody do not receive the allowance of $16 per day for expenses of subsistance.

When a witness is committed to custody for want of security for his appearance, he receives, in addition to his subsistance provided at the expense of the United States Government while he is in custody, compensation of $1.00 per day.

Whenever a witness who is detained in custody is in attendance in court or before a United States Commissioner or before a person authorized to take his deposition, he receives the witness fee of $20 for each day's attendance.

XIV.

The interpretation given the statute by the United States Attorney is in accordance with the clear wording and clear meaning of the statute and is the same as the interpretation given the statute by the various United States [22] Courts, both District Courts and Appellate Courts.

XV.

Any witness remanded to custody because his testimony would be material in a criminal proceeding appears before a United States Commissioner who sets a bond and requires him to give bail for his appearance as a witness in the criminal proceeding. If the person fails to give the bail to secure his appearance, he is committed to the custody of the Marshal pending final disposition of the criminal proceeding in which his testimony is material provided by Rule 46(b) of the Federal Rules of Criminal Procedure. If it is practical to do so, the witness' testimony is taken by deposition, and the witness is released without being required to give bail for his appearance.

The named plaintiffs in this cause were committed to the custody of the United States Marshal pending final disposition of a criminal proceeding in which their testimony was material upon their failure to give bail to insure their appearance as witnesses. Each named plaintiff was held as a material witness in the criminal proceeding involving the person accused of either aiding and abetting their illegal entry into the United States or transporting the named

plaintiffs after plaintiffs had made illegal entry into the United States.

WHEREFORE, premises considered, defendant prays that [23] upon hearing hereof plaintiffs take nothing by their suit and defendant go hence without day and recover all costs.

SEAGAL V. WHEATLEY
United States Attorney

s/ RALPH E. HARRIS
Assistant U.S. Attorney
P.O. Box 74
El Paso, Texas 79941

* * * * *

DEFENDANT'S OBJECTIONS TO INTERROGATORIES—Filed: September 30, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the United States of America, defendant in the above entitled and numbered cause and files this its Objections to Interrogatories and in support thereof would respectfully show unto the Court the following:

I.

Prior to defendant's having filed its answer in this cause, plaintiffs caused to be served upon defendant certain interrogatories. Defendant objects to each and every interrogatory in the following particulars:

[24] The interrogatories inquire about a large number of people who, according to plaintiffs, are citizens of Mexico and were arrested in the United States because of illegal entry.

The matters inquired about by plaintiffs are matters of public record and can be obtained by plaintiffs from the public records.

II.

It would be oppressive and place an unjust burden upon defendant to require defendant to furnish such information as a Mexican citizen's address, particularly in this

instance, where plaintiffs are contending that they are representing each and every individual inquired about in the interrogatories.

III.

It would be an unjust burden on defendant to require defendant to gather the information inquired about in the interrogatories when such information is just as readily available to plaintiffs as defendant.

IV.

The interrogatories are not directed to discovery of matters which are in issue in this cause.

[25] WHEREFORE, premises considered, defendant prays that defendant's Objections to Interrogatories be in all things sustained.

Respectfully submitted,

SEAGAL V. WHEATLEY
United States Attorney

s/ RALPH E. HARRIS
Assistant U.S. Attorney
P.O. Box 74
El Paso, Texas 79941

* * * * *

MOTION FOR SUMMARY JUDGMENT—Filed: October 26, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the United States of America, defendant in the above entitled and numbered cause, and files this its Motion for Summary Judgment and in support thereof would respectfully show unto the Court the following:

I.

This Motion for Summary Judgment is made under the provisions of Rule 56(b), Federal Rules of Civil Procedure. The pleadings in this cause fail to raise a material and genuine issue of fact. The only issue before the Court is the interpretation to be given to 28 U.S.C. § 1821.

The interpretations given 28 U. S. C. § 1821 by [26] numerous Circuit Courts of Appeal in the United States establish that defendant is entitled to judgment as a matter of law.

WHEREFORE, premises considered, defendant prays that its Motion for Summary Judgment be set down for hearing by the Court and that upon hearing, defendant's Motion and Summary Judgment be in all things granted and all costs in this cause be taxed against plaintiff and for such other and further relief, special or general, at law or in equity, to which defendant may show itself justly entitled to receive.

SEAGAL V. WHEATLEY
United States Attorney

s/ RALPH E. HARRIS
Assistant U.S. Attorney
P.O. Box 74
El Paso, Texas 79941

• • • • •

MOTION FOR A PERIOD OF SIXTY DAYS PRIOR TO SETTING OF HEARING ON MOTION FOR SUMMARY JUDGMENT—Filed: November 12, 1970

Now comes the Plaintiffs through their attorney of record and request the Court that a period of sixty (60) days to wit, up to and including the thirtieth (30th) day of December 1970, to answer the governments brief prior to setting of hearing on motion for summary judgment and as grounds therefor state the following:

I.

[27] That the Government has filed a motion for summary judgment and its brief in support of such motion.

II.

That no hearing has been set in Court for such motion for summary judgment.

III.

That the issues involved are numerous and complex and involve very valuable rights to both parties.

IV.

That a period of at least sixty (60) days is reasonably required by the Plaintiffs to act under rule 56 of the Federal Rules of Civil Procedure to file, answering brief, and any pleadings or affidavit deemed necessary.

V.

That the granting of the request of Plaintiffs herein having a delay in the setting of the hearing on motion for summary judgment cannot and will not affect or hurt the governments position and that the delay is sought so that justice may be done in this case.

WHEREFORE, premises considered, Plaintiffs pray that the setting for hearing on summary judgment be made after the thirtieth (30th) day of December, 1970.

ARMENDARIZ & ARMENDARIZ
Attorneys For Plaintiffs

s/ ALBERT ARMENDARIZ, SR.

[28]

FIRST AMENDED COMPLAINT—Filed: December 3, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

With leave of Court first had and received, comes the Plaintiffs, FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE, ENRIQUE GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN, individually and as members of a class as hereinafter alleged claiming against the United States of America and allege as follows:

I.

That each Plaintiff is a member of a class as hereinafter alleged and entitled to be paid by and are claiming a sum of money from the United States of America. That this Court has jurisdiction and authority over these claims in that they arise under Title 28 U.S.C. Sec. 1346 (a), (2). That the claim of each Plaintiff herein whether named or as a member of the class does not exceed the sum of TEN THOUSAND DOLLARS ($10,000.00). That each claim herein is based on an Act of Congress, to wit, Title 28, U.S.C. 1821. That this statute authorized recovery on the pecuniary allegations of this lawsuit.

II.

That this suit seeks to enjoin the enforcement of a Federal Statute, to wit, Title 28, U.S.C. 1821 as repugnant to the Constitution of the United States of America, Fifth and Thirteenth Amendments as more fully alleged hereinafter. That [29] it therefore is authorized as and arises out of Title 28 U.S.C. 2282 as directed by Title 28 U.S.C. 2284 and requires a three judge court.

III.

That there is a case of actual controversy between the parties herein regarding the interpretation and application of Title 28 U.S.C. 1821 and the Constitutionality thereof that authorizes the remedy of Declaratory judgment which the Plaintiffs seek herein as more fully alleged hereinafter.

That the authority for this relief is found in Title 28 U.S.C. 2201.

IV.

That this suit therefore is a suit for money judgment, declaratory judgment and for injunctive relief all brought in favor of the named Plaintiffs and a class under Rule 23 of the Federal Rules of Civil Procedure. That as grounds for and the Basis for a class action under Rule 23, Plaintiffs allege the facts to be as follows:

a) That your Plaintiffs are citizens of the Republic of Mexico who have been held, are being held or will be held in the future, if no injunction issues, as material witnesses pursuant to Rule 46 (b) of the Federal Rules of Criminal Procedure for and on behalf of the United States of America. That there are so many of these persons who have been held, are being held and will be held in the future that the joinder of all its members is impracticable. That the Defendant possesses [30] in his files the name and address of each individual previously held or held to date and that the class is amenable to all notices that may be required to satisfy due process or the discretion of this court, as provided by Rule 23 (c) of the Federal Rules of Civil Procedure. A partial list of members of the class is attached to this complaint as exhibit A.

b) That all questions of law and fact herein are common to the class with the exception of the exact dates of incarceration. In this connection, Plaintiffs state that they have been paid and will be paid the sum of one dollar ($1.00) per day for each day of incarceration under said rule.

c) That the claims of the representative parties are typical of the claims of the class in that they arise from such incarceration and all are complaining of the payment of the sum of one dollar ($1.00) for each day of such incarceration by the United States of America rather than the sum of $21.00.

d) That the representative parties will fairly and adequately represent all of the members of said class together with their interests.

e) That the prosecution of separate actions by individual members of the class would create the risk of:

(A) INCONSISTENT OR VARYING ADJUDICATIONS WITH RESPECT TO INDIVIDUAL MEMBERS OF THE CLASS [31] WHICH WOULD ESTABLISH INCOMPATIBLE STANDARDS OF CONDUCT FOR THE DEFENDANT UNITED STATES OF AMERICA IN OPPOSITION TO THE CLASS, AND/OR.

(B) ADJUDICATIONS WITH RESPECT TO INDIVIDUAL MEMBERS OF THE CLASS WHICH WOULD AS A PRACTICAL MATTER, BE DISPOSITIVE OF THE INTERESTS OF THE OTHER MEMBERS AND PARTIES TO THE ADJUDICATION.

f) That the United States of America, through its agents has acted on grounds generally applicable to the class, to wit, that such incarceration as material witnesses for the Government merits the payment of but one dollar ($1.00) per day of such incarceration, thereby making appropriate injunctive relief and corresponding Declaratory relief with respect to the class as a whole.

V.

Plaintiffs allege that they are entitled to an order of this Court that this suit may and will be maintained as a class action.

VI.

Plaintiffs allege that they are entitled to a three judge Federal Court to adjudicate this matter and that only a three judge Court has jurisdiction over this issue.
[32]

VII.

Plaintiffs allege that an actual controversy presenting a justiciable issue exists between the parties herein regarding the interpretation and constitutionality of Title 28 U.S.C. 1821 in that the Government has in the past, and admits in its pleadings that it will in the future, interpreted said statute to mean that Plaintiffs and members of their class are and will be entitled to payment of one dollar ($1.00) for each day of such incarceration while Plaintiffs

claim and allege that such statute requires and authorizes the payment of the sum of twenty dollars ($20.00) per day or the aggregate sum of twenty-one dollars ($21.00) per day of such incarceration. Plaintiffs further allege, in the alternative, that if said statute authorizes the sole payment of one dollar ($1.00) per day, as compensation for such incarceration, it is repugnant to the Constitution of the United States, Amendment Five, in that it authorizes the deprivation of life and liberty without due process of law and authorizes the deprivation of life and liberty without due process of law and authorizes the taking of property in the nature of services for public use without just compensation, and is further repugnant to the 13th amendment, thereof in that it authorizes involuntary servitude not the subject of a crime for which each Plaintiff has been convicted and is further repugnant to the policy and theory of the law of the land.

[33]

VIII.

Plaintiffs allege that they are entitled to a declaratory judgment and a corresponding permanent injunction against the United States and its agents declaring that the Plaintiffs and each of them is entitled to the sum of twenty-one dollars ($21.00) per day of incarceration under the provisions of rule 46 (b) of the Federal Rules of Criminal Procedure and Title 28 U.S.C. §1821, and prohibiting and enjoining the United States and its agents from incarcerating members of the class in the future and paying them and each of them, upon such incarceration to pay such persons the sum of twenty-one dollars ($21.00) per day.

IX.

Plaintiffs allege that they are entitled to a judgment as against the United States of America in a sum equal to twenty-one dollars ($21.00) per day of their past incarceration minus the sum of one dollar ($1.00) per day that they have been previously paid, together with interest from date of entitlement.

X.

In the alternative, if the statute on its face or as interpreted and applied, provides for the payment of only one

dollar ($1.00) per day to material witnesses who are incarcerated, that statute is unconstitutional and void insofar as it deprives the Petitioners and all of the members of the class which they represent, the equal protection of [34] the laws, and therefore due process of law, in contravention of the Fifth Amendment of the Constitution of the United States, in that it provides for the payment of as much as thirty-six ($36.00) dollars per day for witnesses who are waiting to be called to testify in the comfort of their hotel room while it provides for only one dollar ($1.00) per day to those deprived of their freedom who are waiting for the same thing and for the same reason in the county jail. In this connection, Plaintiffs would show the court that the Government pays others called as witnesses the sum of twenty dollars ($20.00) per day for attending court even though they are not actually in Court and whether they are called to testify or not while it pays members of Plaintiffs' class the sole sum of one dollar ($1.00) per day even during the time that the court in which they are to testify in is actually in session and has called the specific case in which each is to testify. Plaintiffs further allege that on many occassions when they give statements and testify for the Government in other Administrative proceedings they are not paid the twenty dollars ($20.00) per day. Plaintiffs allege that they are entitled to a Declaratory Judgment declaring Title 28 U.S.C. 1821 violative of the Constitution Amendment 5 and 14 and for a corresponding injunction enjoining the Government from paying others the sum for waiting to give their testimony without paying members of the class the same amount.

[35]

XI.

Plaintiffs further allege in the alternative, that if the three judge Federal Court should find that such statute reads the sum on one dollar ($1.00) per day for such incarceration and that such statute is unconstitutional for that reason or for any reason that the Plaintiffs and each member of the class is entitled to trial by jury to determine the true and fair value of the time spent in jail awaiting to testify as in case of eminent domain.

Plaintiffs pray for relief as follows:

1. For an order under rule 23 of the Federal Rules of Civil Procedure as a class action.

2. For such orders as the court may deem fit at his discretion to notify the members of the class as contemplated by said Rule 23.

In this connection, Plaintiffs respectfully suggest to the court that a full list of the names, addresses, dates of incarceration and payments to each member of this class is readily available in separate and distinct records in the hands of several agencies of the Defendant, such as the office of the United States Marshall, the United States Attorney's office and the Immigration and Naturalization Service and that such records should be made available to the court voluntarily or on the court's order to fascilitate the notification of these persons under Rule 23 and for payment and distribution of any [36] judgment recovered on their behalf.

3. That a three-judge court be convened to try this case on its merits.

4. That after hearing on the merits, the court issue the following judgment:

A. (1) Declaring that Title 28 U.S.C. 1821 requires the payment of the sum of twenty dollars ($20.00) to each member of the class and Plaintiffs herein, for each day of incarceration under Rule 47(c) of the Federal Rules of Criminal Procedure in addition to the daily sum of one dollar ($1.00) and their subsistance.

(2) Enjoining the Defendant from any further incarceration of any person under such rule under the present interpretation of 1821 at one dollar ($1.00) per day total payment.

(3) Requiring the Defendant, through his agents to pay to Plaintiffs and the members of the class such sum of money as will equal twenty-one dollars ($21.00) per day of each individual incarceration minus any sum previously paid to such person, together with interest from date of entitlement.

(4) Ordering the Defendant to pay, directly to Plaintiffs' attorneys, such part of each individual [37] recovery, as the court may deem just and within legal bounds.

B. If after final hearing, the court feels that Title 28

U.S.C. 1821 limits payment to Plaintiffs and members of their class to one dollar ($1.00) per day and in that event only for a judgment.

(1) Declaring Title 28 U.S.C. 1821 unconstitutional as repugnant to the 5th and 13th amendment thereof.

(2) Enjoining the Defendant from further incarceration of persons and members of the class under Rule 47(c) until such time as Congress passes a constitutional statute.

(3) Declaring Plaintiffs and the classes' right to a trial by jury for post incarceration on the issue of the reasonable value of such incarceration and service.

(4) Ordering Defendants to pay directly to Plaintiffs' attorneys such part of each individual entitlement as found by the jury as the court may deem just and within legal bounds.

C. Ordering the Defendant to cease and desist from the unequal payment of witness fees to those incarcerated during actual trial of the cause in which each of such incarcerated witness is to testify.

[38] D. For court costs.

E. For such further relief in law and in equity to which Plaintiffs and the class may be justly entitled to.

ARMENDARIZ & ARMENDARIZ
Attorneys at Law
609 Myrtle Ave.
El Paso, Texas
By s/ Albert Armendariz, Sr.

NOTE: Exhibit A attached to First Amended Complaint omitted; heretofor copied on page 11.

* * * * *

PLAINTIFFS' CROSS MOTION
FOR SUMMARY JUDGMENT—Filed: December 14, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Plaintiffs and each of them, for themselves and for the class they represent, and file this their Cross Judgment for summary judgment and in support thereof would respectfully show the Court the following:

I.

That this Cross-Motion for Summary Judgment is made in lieu of and without waiving the position of the plaintiffs that this case should be declared a class action and decided [39] by a three-judge Federal court.

II.

That in this event only the Plaintiffs make this Motion for Summary Judgment under the provisions of Rule 56(b), Federal Rules of Civil Procedure, in that the only issue before this Court is an issue of law involving the interpretation and application of a Federal statute to wit, 28 U.S.C. Sec. 1821. That interpretations given to said statute by the Court in Higginson's case, Federal case #6471 (1802) establishes that the Plaintiffs are entitled to judgment as a matter of law.

WHEREFORE, premises considered, plaintiffs pray that its Motion for Summary Judgment be set down for hearing by the Court and that upon hearing, plaintiffs' Motion and Summary Judgment be in all things granted and all costs in this cause be taxed against defendant and for such other and further relief, special or general, at law or in equity, to which plaintiffs may show themselves justly entitled to receive.

s/ ALBERT ARMENDARIZ
Attorney for Plaintiffs

609 Myrtle Ave.
El Paso, Texas 79901

MOTION FOR ORDER UNDER RULE 23 (c) (1) AND ORDER UNDER 23 (c) (2)—Filed: December 14, 1970

TO SAID HONORABLE COURT:

[40] Now come the Plaintiffs and allege for the purposes of this Motion that in their First Amended Complaint they have alleged full compliance with all the pre-requisities of Rule 23 to merit a class action. That in addition thereto, Plaintiffs allege that a denial of a class action is unwarranted, impractical and will deprive the members of the class of a valuable right, because each and every member

of that class is a Mexican alien, unversed in United States law and procedures, who has been paid and will be paid the sum of $1.00 per day for his incarceration and summarily deported to Mexico where he is unable because of poverty and lack of knowledge of his rights to come to the United States and make claim for what is justly his.

That each member of the class is readily ascertainable in the records of the United States Government and several of its agencies that that notification to each member of the class is possible.

WHEREFORE, premises considered, Plaintiffs pray for a determination by order of this court that this action is to be maintained as a class action in accordance with Rule 23(c)(1) of the Federal Rules of Civil Procedure and a further order of this Court under said Rule 23(c)(2) directing to the members of the class the best notice practicable under the [41] circumstances.

Respectfully submitted,

s/ ALBERT ARMENDARIZ
Attorney for Plaintiffs
609 Myrtle
El Paso, Texas 79901

MOTION FOR AN ORDER CALLING A THREE-JUDGE COURT, TITLE 28, SEC. 2282, 2284—Filed: December 14, 1970

TO SAID HONORABLE COURT:

Now comes the Plaintiffs and present through this Motion to the Judge of this court, their first Amended Petition and pray for a three-judge court, and as grounds therefore would show the court the following:

I.

That this action comes under the purview of Title 28 U.S.C. 2282 and 2284(2) in that this is a suit seeking an injunction restraining the enforcement, operation and execution of an Act of Congress as repugnant to the Constitution of the United States.

II.

That this Court order notice to be given by registered or certified mail to the Attorney General of the United States by the Clerk of this Court unless waived.

[42] WHEREFORE, premises considered, Plaintiffs pray the Court that he notify the Chief Judge of this circuit requesting the said Chief Judge to designate a circuit judge and one other district judge to serve as members of this court to hear and determine this proceeding and that notice issued to the Attorney General, such notice being of at least five (5) k days duration and by registered or certified mail originating with the clerk of this Court and for such orders in the premises to which Plaintiffs may be justly entitled to.

Respectfully submitted,

s/ ALBERT ARMENDARIZ
Attorney for Plaintiffs
609 Myrtle
El Paso, Texas 79901

MOTION FOR A HEARING ON WRITTEN INTERROGATORIES—RULE 33, F.R.C.P.—Filed: December 14, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

Now come plaintiffs and move under Rule 33 of the Federal Rules of Civil Procedure for a hearing and as grounds therefore would show the Court the following:

I.

That your Plaintiffs served upon the Defendant a group of ten interrogatories. That the Defendants thereafter filed with this Court certain objections to said interrogatories but have failed to set the objections for a hearing as required [43] by this Rule and have wholly failed to make answers to said interrogatories.

II.

Plaintiffs allege that the objections of the Defendant to the interrogatories are without merit and that this Court

should require the Government to answer each of such interrogatories immediately. That such objections were directed at all of the interrogatories and not to each of them as required by law.

WHEREFORE, premises considered, Plaintiffs pray for a hearing on said objections and that upon such hearing, the Government be required to answer Plaintiffs' interrogatories.

Respectfully submitted,

s/ ALBERT ARMENDARIZ
Attorney for Plaintiffs
609 Myrtle Ave.
El Paso, Texas 79901

NOTE: Portion of Record Omitted
Filed in its Original Form.

* * * * *

ORDER OVERRULING MOTION TO DESIGNATE A THREE-JUDGE DISTRICT COURT—Filed: April 8, 1971

On the 14th day of December, 1970, came on to be considered by the Court, plaintiffs' motion to Designate a [44] Three-Judge Court to consider the above entitled and numbered cause, and the Court, after considering the pleadings and the applicable law, is of the opinion that the pleadings in this cause fail to raise a substantial constitutional question. The complaint fails to allege a basis for equitable relief and the complaint fails to raise an issue which would bring this case within the requirements of Title 28, United States Code, Section 2284.

It is, therefore, ORDERED, ADJUDGED and DECREED that plaintiffs' Motion to Designate a Three-Judge District Court to hear this cause is in all things overruled.

s/ ERNEST GUINN
United States District Judge

JUDGMENT—Filed: April 8, 1971

On the 14th day of December, 1970, came on to be heard by the Court, defendant's motion for summary judgment and the plaintiffs having appeared by and through their counsel and the defendant having appeared by and through the United States Attorney, and the Court, after considering the pleadings, arguments of counsel, and applicable law, is of the opinion that the pleadings in this cause fail to raise a material and genuine issue of fact, and the only issue before the Court is the interpretation of Title 28, United States Code, Section [45] 1821. The Court is of the opinion that the defendant is entitled to judgment in this cause.

It is, therefore, ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment is in all things granted, with costs taxed against plaintiffs.

s/ ERNEST GUINN
United States District Judge

NOTICE OF APPEAL—Filed: April 26, 1971

Notice is hereby given that FELIPE JUAREZ HURTADO, et. al., Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the order Overruling Motion To Designate A Three-Judge District Court and from the final judgment entered in this action on April 8, 1971.

ARMENDARIZ AND ARMENDARIZ
Attorneys for Plaintiffs

s/ ALBERT ARMENDARIZ, SR.
609 Myrtle
El Paso, Texas 79901

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-2034

Summary Calendar *

FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN, Individually and as members of a class,

PLAINTIFFS-APPELLANTS,

versus

THE UNITED STATES OF AMERICA,

DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Western District of Texas

---

(December 21, 1971)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: The five appellants are aliens who, as material witnesses in pending federal criminal prosecutions have been incarcerated pursuant to Rule 46(b), F.R.Crim.P.,[1] upon failure to give bail. Some of them were

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* Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F. 2d 409, Part I.

[1] "Rule 46, *Bail*

. . . . .

"(b) *Bail for Witness.* If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail."

confined at the time suit was filed; others had been recently released. On behalf of themselves and a class of persons similarly situated they filed suit challenging the validity of payment to them, pursuant to 28 USC § 1821,[2] the statute prescribing compensation to witnesses in federal cases, of only $1 per day while they are incarcerated and not in attendance in court. They sought damages in the form of payment of additional amounts claimed to be due, and declaratory and injunctive relief relating to § 1821.

Appellants urge that, as to a witness incarcerated and not in attendance in court, § 1821 should be construed to require payment to him of $21 per day, and, alternatively that, if that section permits payment to him of only $1 per day, it violates the Due Process and Just Compensation Clauses of the Fifth Amendment to the constitution and creates an involuntary servitude in controvention of the Thirteenth Amendment.

The District Judge declined to request a three-judge court on the ground that no substantial federal question was presented, and granted summary judgment for the

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[2] "§ 1821. *Per diem and mileage generally; subsistence*

"A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $20 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 10 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $16 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided*, That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further*, That this section shall not apply to Alaska.

"When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day."

government on issues of statutory construction and constitutionality. We affirm.

Appellants have not challenged the constitutionality of Rule 46(b), or the standards for incarceration, or the validity of incarcerating a witness who is unable to give bail. Rather their challenge is to the scheme of payment provided for those who are confined.

1. Statutory Interpretation.

Section 1821 explicitly declares that $20 per day is due only when a witness is "in attendance" or travelling to and from court. Only when "[a] witness [is] attending in any court of the United States . . . shall [he] receive $20 for each day's attendance and for the time necessarily occupied in going to and returning from the same. . . ." It does not seem a slip of the draftsman's pen that the section omits to extend the $20 per day allowance to each day of a detained witness' confinement. In other respects the statute specifically treats incarcerated witnesses apart from non-incarcerated witnesses, leading to the inference that the failure explicitly to grant the $20 to the former group during their detention was deliberate. For example, "[w]itness . . . who are not in custody and who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $16 for expenses of subsistence. . . ." "When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day."

We, therefore, reject the theory that § 1821 requires payment of $21 per day to a detained witness not in attendance in court.

2. Constitutional Arguments.

a. *Thirteenth Amendment.*

There is no merit to the contention that detention without payment reasonably reflecting the loss of working time creates an involuntary servitude. In *Heflin v. Sanford*, 142 F.2d 798 (5th Cir. 1944) we rejected a similar argument made by a conscientious objector, who "lays much stress on the fact that he was to be paid little, if anything, for his work":

> Whether appellant was to be paid much, or little or nothing, is not the question. It is not uncompensated service, but involuntary servitude which is prohibited by the Thirteenth Amendment.

142 F.2d at 799. In numerous ways the government legitimately impinges upon the liberty of the individual without the impingement alone constituting the kind of involuntary servitude contemplated by the Thirteenth Amendment, for example, requiring a conscientious objector to perform alternative service, *Klubnikin v. U.S.*, 227 F.2d 87 (9th Cir.), *cert. denied*, 350 U.S. 975, 100 L.Ed. 846. *reh. denied*, 351 U.S. 915, 100 L.Ed. 1449 (1955); *Heflin v. Sanford, supra;* requirements of tax laws, *Porth v. Brodrick*, 214 F.2d 925 (10th Cir., 1954); control and education of children, *Bryant v. Brown*, 18 So. 184 (Miss. Sup. Ct. 1928); refusal to work for municipality as condition for receiving aid for family, *Commonwealth v. Pouliot*, 292 Mass. 229, 198 NE 256 (1935); requirement that able-bodied men work on roads, *Butler v. Perry*, 240 U.S. 328, 60 L.Ed. 672 (1916); administration of veterans' decedents estates by public administrator without payment of fees, *Crews v. Lindquist*, 197 NE 768 (Ill. Sup. Ct. 1935); jury duty, *Id.* (dictum); commitment of a defendant acquitted on plea of insanity, *State v. Snell*, 89 P. 931 (Wash. Sup. Ct. 1907).

b. *Fifth Amendment Due Process.*

It is helpful to an understanding of this issue to reiterate what we pointed out above, that appellants do not claim that material witnesses, even indigent ones, may not constitutionally be imprisoned if they cannot give bail, that rather they claim that the government may incarcerate material witnesses if, and only if, it provides compensation sufficient in amount to reach constitutional standards. The argument might be restated this way: in a balancing of interests the governmental interest in assuring the testimony of material witnesses justifies imposing loss of liberty only when the government properly compensates those imprisoned. The argument must be rejected.

A closely similar argument was made and rejected in *Commers v. U.S.*, 66 F. Supp. 943 (D. Mont.), *aff'd*, 159 F.2d 248 (9th Cir.), *cert. denied*, 331 U.S. 807, 91 L.Ed. 1828

(1946). A World War II draftee was disabled in combat and sued under the Just Compensation Clause of the Fifth Amendment for the capitalized value of his future income lost because of his injuries. The District Court found that his induction and assignment were constitutionally valid and pointed out that his theory, if accepted, would severely reduce the liberties of citizens—i.e., a conclusion that deprivation of personal liberty is acceptable in some circumstances by reason of the government's willingness to disburse dollars as compensation carries with it the implication that in other circumstances liberty (or other constitutionally guaranteed rights) may be taken so long as paid for in dollars.

Also the wording of the Fifth Amendment is not favorable to appellants' theory. It declares that "life, liberty, or property" shall not be deprived without due process. In the next clause it permits "private property" to be taken "for public use" only if "just compensation" is paid. The juxtaposition of the two clauses is significant. Only private property is compensable. The result is not a lower standard for deprivation of "life" or "liberty" but one more strict —"life" and "liberty" are not alienable if only money is the proffered consideration.

Appellants urge that at least to some extent Fifth Amendment due process incorporates Fourteenth Amendment equal protection standards, and that those standards have not been met. Only recently the Supreme Court has said:

> While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification which meets the test articulated in *Dandridge* [*Dandridge v. Williams*, 397 U.S. 471, 487, 25 L.Ed. 2d 503 (1970)] is perforce consistent with the due process requirement of the Fifth Amendment. Cf. *Bolling v. Sharpe*, 347 U.S. 497, 499.

Reed v. Reed, — U.S. —, 40 L.W. 4013, 4016 (Nov. 22, 1971)' The *Dandridge* test is that the federal statute must be "rationally based and free from invidious discrimination."

' See also: Steward Mach. Co. v. Davis, 301 U.S. 548, 81 L.Ed. 1279 (1937); Hurd v. Hodge, 334 U.S. 24, 92 L.Ed. 1187 (1947).

Under § 1821 each incarcerated and nonincarcerated witness when in attendance in court receives $20 "for each day's attendance." The nondetained witness receives a travel allowance for going from and returning to his place of residence. The detained witness receives none and is entitled to none, since necessarily the government must transport him. The jailed witness receives his subsistence in kind, while the witness not in jail, if he is sufficiently far from his residence that he cannot return thereto, is entitled to a subsistence allowance of $16 per day. Comparing the incarcerated witness in attendance with his counterpart, the nonincarcerated witness in attendance (and entitled to subsistence), the former is entitled to $21 per day and subsistence in kind, the latter to $36 per day, but he must pay for his own subsistence. We perceive no lack of rationality or discrimination in this.

The sole inequality remaining is that between payment made to a witness while attending court and the $1 per day paid to an incarcerated witness when not attending. Appellants' argument seems to be that the $20 per day attendance fee is intended to compensate a witness, incarcerated or not, for the loss of his ability to carry on his normal pursuits, and that an incarcerated witness suffers the same loss of ability to carry on normal pursuits whether attending court or languishing in jail waiting for court to commence, but is compensated only $1. The short answer is that governmental recognition of its interest in having persons appear in court by paying them for that participation in judicial proceedings, does not require that it make payment of the same nature and extent to persons who are held available for participation in judicial proceedings should it prove to be necessary. That the government pays for one stage does not require that it pay in like manner for all stages. Also we doubt that the $1 is related at all to compensation, but rather is a stipend for items of personal comfort and care needed by one in confinement, such as toilet articles, sweets, and reading matter. In addition, appellants' position would deny the federal government the ability to pursue mischiefs with partial solutions. *See,* in the equal protection area, *e.g., Railway Express Agency v. New York,* 336 U.S. 106, 93 L.Ed. 533 (1949); *Williamson v. Lee Optical Co.,* 348 U.S. 483, 99 L.Ed. 563 (1955).

c. *Fifth Amendment Just Compensation.*

The ability to earn a living, appellants say, is "private property" within the meaning of the Just Compensation Clause, so that it cannot be taken without payment of compensation. This suggestion was presented and rejected in *Commers v. U.S., supra.* We doubt the appropriateness of equating "property" in the Due Process Clause with "private property" in the Just Compensation Clause. To do so would present the Congress with setting the standard of payment for a class of private property, which is a judicial function. *See, e.g., Monongahelo Nav. Co. v. U.S.,* 148 U.S. 312, 37 L.Ed. 463 (1893). Also, as we have said earlier, the idea that incarceration is to be validated by dollar payments rather than on the basis of other governmental interests is a theory not easily confined within rational limits.

3. Three judges or one.

The foregoing leads us to the conclusion that the District Court correctly found that the federal questions were insubstantial, so that there was no necessity of requesting a three judge court. *Ex parte Poresky,* 290 U.S. 30, 78 L.Ed. 152 (1933). We reject the suggestion that the *Poresky* principle is inapplicable because money damages are here sought under 28 USC § 1346(a)(2), while in *Poresky* jurisdiction was founded on 28 USC § 1331. The purposes of avoiding unnecessary assemblage of three judges are equally applicable whatever jurisdictional head the plaintiff invokes.

4. Conclusion.

Thus we reach the ultimate result that the District Judge was correct in denying a three-judge court and in granting a summary judgment for the United States.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2034
Summary Calendar

D. C. Docket No. EP-70-CA-134

FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN, Individually and as members of a class,

PLAINTIFFS-APPELLANTS,

versus

THE UNITED STATES OF AMERICA,

DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Western District of Texas

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

DECEMBER 21, 1971

Issued As Mandate: March 9, 1972

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 871-2034

FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE and JORGE (SERGIO) MIRANDA GAUCIN, Individually and as members of a class,

PLAINTIFFS-APPELLANTS,

versus

THE UNITED STATES OF AMERICA,

DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Western District of Texas

[U.S. Court of Appeals Filed Mar. 1, 1972]

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for leave to file a petition for rehearing out of time in the above cause, is hereby GRANTED and the petition for rehearing is DENIED.

SUPREME COURT OF THE UNITED STATES

No. 71-6742

FELIPE JUAREZ HURTADO ET AL.,

PETITIONERS,

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 10, 1972

☆ U.S. Government Printing Office: 1972—489-356/320

COPY

FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6742

FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE, and JORGE (SERGIO) MIRANDA GAUCIN LAZALDE, Individually and as Members of a Class,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6742

FELIPE JUAREZ HURTADO, RAMON AVILA HURTADO, VICTOR GAUCIN LAZALDE, and JORGE (SERGIO) MIRANDA GAUCIN LAZALDE, Individually and as Members of a Class,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Western District of Texas, El Paso Division, in this cause is reported at 452 F.2d 951. Said opinion was delivered on December 21, 1971.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit in this cause was entered on December 21, 1971. A petition for rehearing was denied on March 1, 1972. Petition for Writ of Certiorari was docketed in this Court on May 30, 1972. The jurisdiction of the Court is invoked under 28 U.S.C. section 1254 (1).

STATUTES INVOLVED

Rule 46 (b) of the Federal Rules of Criminal Procedure reads as follows:

"(b) *Bail for Witness.* If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail."

Title 28 U.S.C. section 1821 reads as follows:

"§*1821. Per Diem and Mileage Generally; Subsistence.*

A witness attending in any court of the United States, or before a United States Commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $20 for each day's

attendance and for the time necessarily occupied in going to and returning from the same, and 10 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $16 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided*, That in lieu of the mileage allowance provided herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further*, That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Thriteenth Amendment to the Constitution of the United States reads as follows:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

The Fourteenth Amendment to the Constitution of the United States, Section 1, reads as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I. Whether the proper interpretation of the statute, 28 U.S.C. §1821, requires that witnesses who are incarcerated pursuant to the provisions of Rule 46 (b) F.R.Crim.P. be paid the sum of twenty-one dollars per

day for their time in jail, or the sum of only one dollar per day.

II. Whether the statute, if interpreted to require the payment of only one dollar per day to incarcerated witnesses, is repugnant to the Fifth Amendment insofar as it denies Due Process of Law by denying just compensation for deprivation of liberty, livelihood and welfare, both on its face and as applied to Petitioners.

III. Whether the statute, if interpreted to require the payment of only one dollar per day to incarcerated witnesses, is repugnant to the Fifth Amendment insofar as it denies "substantive" Due Process of Law by violating fundamental principles of justice.

IV. Whether the statute, if interpreted to require payment of only one dollar per day to incarcerated witnesses, is repugnant to the Due Process Clause of the Fifth Amendment insofar as it imposes deprivation of equal protection of the law, as guaranteed by the Fourteenth Amendment, both on its face and as applied to Petitioners.

V. Whether the statute, if interpreted to require the payment of only one dollar per day to incarcerated witnesses, is repugnant to the Thirteenth Amendment, insofar as it imposes involuntary servitude, both on its face and as applied to Petitioners.

VI. Whether Petitioners' request for the convening of a three-judge court pursuant to 28 U.S.C. §2282 was improperly denied.

STATEMENT OF THE CASE

Petitioners were incarcerated in the El Paso County Jail as material witnesses in a pending criminal prosecution pursuant to the provisions of Rule 46 (b) of

the Federal Rules of Criminal Procedure upon their inability to give bail for their appearance. Upon their release, they were paid one dollar for each day of their incarceration. Petitioners filed this action on behalf of themselves and that class of persons who had been, were, and would be in the future incarcerated as material witnesses and paid only one dollar per day for such incarceration. Petitioners asserted that the proper interpretation of 28 U.S.C. §1821 requires that the "per diem" compensation provided for in the statute is payable to incarcerated witnesses during their incarceration, such that they and the members of their class were entitled to receive the total sum of twenty-one dollars per day of incarceration. In the alternative, they alleged that if the statute in fact requires payment of only one dollar per day to incarcerated witnesses, it is repugnant to the Constitution, and that they and the members of their class are entitled to recover just and adequate compensation for the time of their incarceration.

The Government's answer admitted incarceration of Petitioners and payment to them of only one dollar per day of their incarceration, but alleged that this was in conformity with the statute, and that the statute, as so interpreted, is constitutional.

Insofar as the Complaint prayed for an injunction to restrain the operation and application of 28 U.S.C. §1821 as unconstitutional, Petitioners requested the convening of a three-judge court to hear and determine the matter pursuant to 28 U.S.C. §2282. The trial court denied this request on the basis that Petitioners' Complaint raised no substantial constitutional questions.

The Government's Motion for Summary Judgment was granted by the trial court, and Petitioners' cross-motion for Summary Judgment was denied, on the basis that the proper interpretation of the statute requires payment of only one dollar per day to incarcerated witnesses, and that the statute, as so interpreted, is constitutional.

The Court of Appeals affirmed the judgment of the trial court.

SUMMARY OF ARGUMENT

I. The history of the legislation involved here illustrates that from the earliest days of the Nation's history, Congress has provided for compensation of witnesses attending in federal courts. The first statute to distinguish between incarcerated and non-incarcerated witnesses, passed in 1853, provided full and adequate compensation for incarcerated witnesses, which, at that time in history, was one dollar per day. This is clear from the fact that non-incarcerated witnesses were provided with one dollar and fifty cents per day, and no specific subsistence allowance, although other provisions of the statute illustrate that fifty cents per day was intended as a subsistence allowance. Therefore, when almost one hundred years later the "dollar-a-day" provision was reinstated in the statute, it logically was motivated by the same intent to fully compensate incarcerated witnesses, and was intended as an additional stipend for incarcerated witnesses over and above the per diem allowance therein provided. This is further illustrated by the fact that over the years the allowances in the statute were raised without amendment of the "dollar-a-day" provision.

Moreover, the language of the current statute itself illustrates an intent that incarcerated witnesses receive

the per diem allowance of twenty dollars. Thus, incarcerated witnesses are specifically excluded from the subsistence allowance, yet they are not specifically excluded from the per diem allowance.

In addition, established rules of statutory construction require an interpretation that incarcerated witnesses are entitled to the per diem compensation. This interpretation is in consonance with the obvious general purposes of the statute, viewed in its entirety, whereas the opposite construction contravenes those purposes. One portion of a statute should not be strictly construed so as to deny what has been granted in another portion. The consequences of the opposite construction are harsh and unjust, and such consequences should not be attributed to Congress. A statute cannot be divorced from the circumstances existing at the time it was passed, and, in 1949, when the "dollar-a-day" provision was re-adopted, circumstances in the Nation, economic and otherwise, had changed from what they were in 1853, and continued to change as the allowances were raised without amendment of that provision. Moreover, the opposite construction renders the statute's constitutional validity doubtful.

II. If the statute requires payment of only one dollar per day to incarcerated witnesses, it is repugnant to the Fifth Amendment insofar as it denies due process of law by denying just compensation for the deprivation of liberty involved here. There is no strict dichotomy between the "due process" clause and the "just compensation" clause. This Court has recognized the interdependence between personal liberties and property rights, and has concluded that they are on an equal level for Constitutional purposes. Here, the deprivation of

liberty resulted in deprivation of livelihood and welfare, and therefore of property. That deprivation was so complete and great as to constitute a "taking" within the meaning of the decisions of the Court concerning just compensation. This does not mean that every restriction of liberty must be compensated—only those which are of sufficient magnitude, as here, so as to constitute a "taking", and then only if they are not directly and immediately related to a strong necessity for the protection of the public health and welfare. In denying just compensation in this case, the statute violates the Fifth Amendment.

III. If there is a dichotomy between "due process" and "just compensation," nevertheless the guarantee of due process protects against violations of fundamental principles of justice and fairness, and to protect such principles it may, of its own force, require compensation. In this case, to deprive a man and his family of their livelihood and welfare and the ability to sustain life contravenes such fundamental principles of justice, and in so doing, the statute violates the guarantee of due process.

IV. The statute, so interpreted, violates due process of law by denying equal protection of the law as guaranteed by the Fourteenth Amendment through the Fifth Amendment, insofar as it creates two classes of witnesses for purposes of different treatment, and grants to one class full and adequate compensation for all time involved in serving as a witness, yet grants to the other class only token compensation for the time of its members while they are in jail waiting to testify. There is no rational basis for this discrimination, and no compelling governmental interest is served thereby.

V. The statute, so interpreted, imposes involuntary servitude in violation of the Thirteenth Amendment. This incarceration would clearly be slavery in the strictest sense in the absence of a governmental interest therein. However, that interest is not sufficient to remove the character of slavery. The complete deprivation of liberty and consequent deprivation of livelihood and welfare degrades and injures incarcerated witnesses, and thereby promulgates an essential characteristic of slavery. Adequate compensation alone can raise the incarceration above the level of slavery. In denying such compensation, the statute imposes involuntary servitude.

VI. The trial court erred in denying Petitioners' application for a three-judge court, and the Court of Appeals erred in affirming that action. Jurisdiction did not initially depend upon the existence of a substantial federal question, and therefore the single judge was not warranted in determining whether the constitutional issues involved are substantial before convening a three-judge court. Moreover, the single judge did more than decide the jurisdictional question and dismiss for want thereof; he determined and rendered judgment upon the merits, and this was unauthorized. If, however, he was authorized to determine whether the constitutional issues are substantial, the determination was erroneous, for the issues are clearly not without substance.

FIRST POINT OF ERROR

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE PROPER INTERPRETATION OF THE STATUTE (28 U.S.C. Section 1821) REQUIRES PAYMENT OF ONLY ONE DOLLAR PER DAY TO INCARCERATED WITNESSES.

Argument and Authorities

Petitioners alleged in their complaint before the United States District Court that the proper interpretation of the provisions of Section 1821 of Title 28, U.S.C., required that they and the members of their class be paid the sum of at least twenty-one dollars per day for each day of their incarceration as material witnesses who had been unable to give security for their appearance at trial. The District Court granted summary judgment against Petitioners and the members of their class, and such judgment was affirmed on appeal by the United States Court of Appeals for the Fifth Circuit. The Court of Appeals reasoned, firstly, that the statute provides that twenty dollars per day is due only when a witness is "in attendance" in court, and that an incarcerated witness is not in attendance within the meaning of those words; and secondly, that insofar as the statute specifically excludes incarcerated witnesses from the subsistence allowance of sixteen dollars per day, the failure to specifically include them in the terms of the twenty dollar per day compensation provision must be interpreted as a specific exclusion therefrom.

It is urged that this holding is incorrect.

From the earliest days of this Nation, Congress has provided for compensation of witnesses in the Federal

Courts. In 1792, the Second Congress made the following provision for witnesses, 1 Stat. 275, section 3 (1792):

> "Sec. 3. And be it further enacted, That from and after the passing of this act, the fees and compensation to the several officers and other persons hereafter mentioned, shall be as follows;
>
> * * * * *
>
> To witnesses summoned in any of the Courts of the United States the same compensations in each state respectively as are allowed in the supreme courts of the same;"

The Fourth Congress enacted the following, 1 Stat. 492, section 2 (1796):

> "Sec. 2. And be it further enacted, That in addition to the compensation now allowed by law to jurors and witnesses, attending in the courts of the United States, there shall be allowed and paid to each grand and petit juror, for his attendance, fifty cents per day; and to each witness, for like attendance, fifty cents per day."

The Fifth Congress set the compensation of jurors and witnesses at one dollar and twenty-five cents per day, 1 Stat. 624, section 6 (1799).

In 1802, the Circuit Court of the District of Columbia considered the question of whether a witness who had been imprisoned upon her inability to give security for her appearance at trial was entitled to be paid for the time which she had spent in jail, in *Higginson's Case*, 2 Fed. Cas. 132, No. 6,471 (D.C. Cir. 1802). The decision of the Court was as follows:

> "THE COURT allowed the witness to prove her attendance, and ordered her to be paid for the whole time she was detained, it being her misfortune and not her fault that she could not obtain security for her appearance."

The first statute which specifically referred to detained witnesses was passed in 1853. That statute, Rev. Stat. section 848 (1875); 10 Stat. 161 (1853), read, in pertinent part, as follows:

"*Witnesses' Fees.* For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for travelling from his place of residence to said place of trial or hearing, and five cents per mile for returning. When a witness is subpoenaed in more than one cause between the same parties in different suits at the same court, but one travel fee and one per diem compensation shall be allowed for attendance, to be taxed in the first case disposed of, and 'per diem' only in the other causes, to be taxed from that time in each case, in the order in which they may be disposed of.

When a witness is detained in prison for want of security for his appearance, he shall be entitled to a compensation of one dollar per day over and above his subsistence.

* * * * *

There shall be paid to such seamen or other person as has been or shall be sent to the United States from any foreign port, station, sea, or ocean, by any United States Minister, Charge d'Affaires, Consul, Commander, or Captain, to give testimony in any criminal case which has been or may be pending in any court of the United States, such compensation as the court which had or shall have cognizance of the crime, shall adjudge to be right and proper, not to exceed one dollar for each day the said seaman or person has been or shall be necessarily on the voyage, and arriving at the place of examination or trial, exclusive of sustenance and transportation; the court to take into

consideration, in fixing said compensation, the condition of said seaman or witness; whether his voyage has been broken up, to his injury, by his being sent to the United States, or not.

If said seaman or person has been or shall be transported in an armed vessel of the United States, no charge for sustenance or transporation shall be made; if in any other vessel, the court may adjudge what compensation shall be paid to the captain of said vessel, and the same shall be paid accordingly: *Provided*, That in no case shall transportation and subsistence be allowed at a rate exceeding fifty cents per diem."

It is abundantly clear that by this statute, Congress intended that incarcerated witnesses be fully compensated daily for the time which they spent in jail. It provided for compensation of one dollar and fifty cents for non-incarcerated witnesses; and of one dollar for incarcerated witnesses. No specific subsistence allowance was provided for, as it is in the current statute; yet it is obvious from the language therein that Congress determined that at that time in history, the sum of one dollar per day was adequate compensation allowance, and the sum of fifty cents per day was adequate subsistence allowance. Thus, the statute provided that witnesses who traveled from foreign territory were to receive "such compensation as the court . . . shall adjudge to be right and proper, not to exceed one dollar for each day. . . ." Transportation and sustenance compensation was to be paid to the captain of the vessel transporting such witnesses, with the proviso that "in no case shall transportation and subsistence be allowed at a rate exceeding fifty cents per diem."

Obviously, the Thirty-Second Congress intended that incarcerated witnesses should receive per diem compen-

sation at the rate of one dollar per day, just as non-incarcerated witnesses, but not the subsistence allowance of fifty cents per day, insofar as their subsistence would be provided for in jail.

Moreover, the statute in no way restricted the per diem compensation of incarcerated witnesses to the time spent actually testifying in court, but rather declared that the compensation was to be "per day." This compensation was declared to be payable "over and above his subsistence," making it clear that the compensation was intended to provide for lost time and income.

This statute was in effect for seventy-three years, until 1926, when it was replaced by 44 Stat. 324 (1926). The new statute omitted the provisions for compensation of incarcerated witnesses; raised the per diem compensation rate to two dollars per day; and added a provision for subsistence allowance at the rate of three dollars per day, from which incarcerated witnesses were specifically excluded.

In 1948, provisions for the compensation of witnesses were codified into Title 28, the Judiciary and Judicial Procedure Code, section 1821, by 62 Stat. 950 (1948). That section of the statute, in its entirety, read as follows:

"§1821. PER DIEM AND MILEAGE GENERALLY; SUBSISTENCE

A witness attending in any court of the United States or before a United States commissioner or person taking his deposition pursuant to any order of a court of the United States, shall receive $2 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 5 cents per mile for going from and returning to his place of residence. Witnesses who are not salaried

> employees of the Government and who are not in custody and who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $3 per day for expenses of subsistence."

The following year, the per diem rate was raised to four dollars a day, and the subsistence rate to five dollars a day. 63 Stat. 65 (1949).

Then, after almost one hundred years since the date of enactment of the 1853 statute, the "dollar a day" provision reappeared in the Code. 63 Stat. 103 (1949) amended section 1821 in the following language:

> "Sec. 94. Section 1821 of Title 28, United States Code, is amended by inserting at the end thereof a new paragraph, as follows:
>
> 'When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day.' "

Thus, the language of the 1853 statute was restored almost verbatim. The House Report concerning the bill, H.R. Rep. No. 352, 81st Cong., 1st Sess. 16 (1949) states the following concerning this amendment:

> "Section 94 of the Bill. This section restores certain provisions of the original statute, R.S. §848, which were inadvertently omitted from revised Title 28, U.S.C. §1821."

In the opening remarks of the Report, the Bill is referred to as a "correctional bill" which "corrects typographical and other minor errors and clarifies the language of some sections to conform more closely to the original law. . . ." (pp. 1, 2)

Thereafter, the "dollar-a-day" provision survived various other irrevelant changes in the language of the section and raises of the rate of compensation and subsistence, and continues to exist in the current statute. 65 Stat. 727 (1951); 68 Stat. 1242 (1954); 70 Stat. 798 (1956), (raised subsistence to $8); 82 Stat. 62 (1968), (raised per diem to $20, subsistence to $16, and raised mileage allowance).

It is submitted that the legislative history reviewed hereinabove clearly indicates that when the 81st Congress re-adopted the language of the 1853 statute in 1949, it intended a very different result than that which was intended by the similar language utilized by the 32nd Congress in 1853. As has been discussed above, there is no question that the 1853 statute was intended to fully compensate incarcerated witnesses for their lost time and income at a rate which, at that time, was adequate and which was fully in consonance with the rate at which non-incarcerated witnesses were compensated. When the language was re-adopted, it was done for the expressed purpose of "conform(ing) more closely to the original law . . .". That original law exhibited no desire to deprive incarcerated witnesses from adequate compensation—on the contrary, it clearly expressed the opposite desire, and recognized the need of incarcerated witnesses. It is submitted that the 1949 amendment was a further recognition of that need—a recognition that incarcerated witnesses, by virtue of their lack of mobility and freedom, would be in need of funds over and above the compensation designed to replace their lost income and the day to day subsistence provided them in jail. Just as a witness who travelled from a distant place would be in need of funds with which to provide himself with room and board, an incarcerated witness would be in need of

toiletries and other personal articles with which he could not provide himself while in jail.

This reasoning is borne out by the fact that later legislatures amended the language of the statute and raised the rates of compensation and subsistence, yet none of them altered the language of the "dollar-a-day" provision. Thus, in 1968, the rate of per diem compensation was raised to twenty dollars, and the rate of subsistence compensation was raised to sixteen dollars; yet the "dollar-a-day" provision remained unaltered. Obviously, the intent of this amendment was to modernize the rates of compensation in order that the statute would properly accomplish its essential purpose—to compensate witnesses and provide against financial loss as a result of performing this service. Is it logical to assume that the legislature chose to ignore this purpose—a purpose which had been exhibited even in the earliest statutes—with respect to incarcerated witnesses? It is more logical to conclude that at this time the "dollar-a-day" provision had taken on new meaning from what it had in 1853. In 1853, it was total and adequate compensation; in 1968, it was, as the Court of Appeals concluded, "a stipend for items of personal comfort and care needed by one in confinement, such as toilet articles, sweets, and reading matter." (section 2b of opinion, 5th paragraph)

The language of the current statute, in and of itself, contains various indications of the legislative intent that incarcerated witnesses receive both the twenty-dollar-per-day and the dollar-per-day compensation. Firstly, the statute is obviously designed to fully compensate witnesses for any and all pecuniary losses or needs which might result from their rendering service as witnesses, as

far as possible. It provides for a per diem compensation to defray lost time and income, and declares that such compensation is payable not only when a witness is in attendance, but also for the time he spends in travelling to and from court. It provides for a mileage allowance to compensate for travel expenses to and from court. It provides for a subsistence allowance for witnesses who travel from distant places in order to defray their expenses for hotel and meals. It provides that witnesses who travel from outside the continental United States are entitled to the actual expenses of their travel at first-class rates, rather than the mileage allowance of ten cents per mile, lest their actual expenses exceed the allowance.

In view of such careful and deliberate effort to protect against pecuniary losses to witnesses, is it reasonable to include that the legislature abandoned the effort when it came to incarcerated witnesses, and chose to ignore them and provide them with mere token compensation? If so, on what basis can such conclusion be reached? Are incarcerated witnesses criminals to be disdained and punished? Surely not. Indeed, it is much more logical to conclude that the effort was extended to provide incarcerated witnesses with their needs in the form of toiletries, tobacco, and reading materials while they were in jail.

In addition, the statute specifically excludes incarcerated witnesses from the subsistence allowance of sixteen dollars per day. This is logical, insofar as their "room and board" is provided for them in jail. Yet, had it been the intention of the legislature to exclude incarcerated witnesses from the per diem compensation of twenty dollars per day, would it not have been equally as specific in its language to accomplish this? Would it not have said "witnesses . . . who are not in

custody . . ." in the sentence dealing with subsistence? Logic compels an affirmative answer.

Moreover, one portion of a statute should not be construed to annul or destroy what has been granted by another portion. *Peck v. Jenness*, 48 U.S. 162, 7 How. 612, 12 L.Ed. 841 (1849). Here, the beginning sentence of the statute has provided for per diem compensation for witnesses without reservation. The fact that incarcerated witnesses have been excluded from another type of compensation, or have been provided with additional compensation, should not be construed to deprive them of that which was granted in the first sentence, in the absence of a clear expression on the part of the legislature of an intention to so deprive them.

The application of other established rules of statutory construction likewise compels the conclusion that the true meaning of this statute requires payment of the twenty-dollar-per-day per diem compensation to incarcerated witnesses. In this regard, it is fundamental that the consequences of alternative interpretations of a statute provide an insight as to the congressional purposes behind it. *Brooks v. U.S.*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949). When a statute is subject to more than one construction, it should not be given a construction which will prove deeply harsh and unjust in its consequences, both as it respects public and individual rights and interests. *Wilson v. Rousseau*, 45 U.S. 646, 4 How. 646, 11 L.Ed. 1141 (1846); *Knowlton v. Moore*, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969 (1900); *Burnet v. Guggenheim*, 288 U.S. 280, 53 S.Ct. 369, 77 L.Ed. 748 (1933). It cannot be presumed that the legislature will do acts that inflict hardship and injustice. *East Saginaw Salt Mfg. Co. v. City of East Saginaw*, 80 U.S. 373, 13 Wall. 373, 202 L.Ed. 611 (1871). On the contrary, it must be

assumed that the members of Congress are sensitive to and respectful of the rights and liberties of individuals. *Ex Parte Mitzuye Endo*, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1945).

With regard to the statute in issue here, what will be the consequences of an interpretation that incarcerated witnesses are entitled to receive only one dollar per day while incarcerated? Obviously, the consequences will be that such witnesses will be incarcerated for days and months at a time and will receive only a token and meager compensation of one dollar per day. Thus, Petitioners Felipe Juarez Hurtado and Ramon Avila Hurtado alleged that they had been incarcerated from the 25th day of March, 1970, to the 19th day of June, 1970, for a period of almost three months. Upon their belated release, they were, presumably, handed checks for approximately eighty-six dollars in compensation of their three month incarceration. It takes no great stretch of the imagination to conceive what must have been the disastrous effects upon their financial well-being and upon their families of this travesty of justice.

It is only reasonable to assume that witnesses who are incarcerated for want of security for their appearance, or at least the great majority of them, are working men and members of the lower financial echelons, for otherwise they would have the means with which to give such security. They are men who work for daily bread for themselves and their families, and to deprive them of a day of their lives is to deprive them of such daily bread, and compensation for that deprivation at the rate of one dollar per day is no compensation at all. Most of them are released from jail only to spend the greater portion of their dollar-a-day "compensation" for transportation back to their homes and needy families, where they return empty-handed.

What then are the consequences of the interpretation given the statute by the lower courts? Financial ruin, poverty, starvation, and untold hardship. Can such consequences properly be atrributed to the Congress of the United States?

Clearly, the more reasonable and beneficial interpretation must prevail. The Court need look no farther than the statute itself to determine that the sum of one dollar per day is wholly inadequate compensation, for the legislature has expressed therein its determination that the sum of twenty dollars per day is adequate per diem compensation.

Moreover, the fact that at one time in history the "dollar-a-day" provision was intended to provide for the entire compensation to be given to incarcerated witnesses does not require a different result, insofar as statutes should not be narrowly construed to permit evasion of their purpose because of changes in circumstances resulting from the passage of time. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968). A section of a statute should not be read in isolation from the context of the whole act, and, in interpreting legislation, the Court should not be guided by a single sentence or portion of a sentence, but should look to the provisions of the whole law and to its object and policy. *Richards v. U.S.*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). A construction of a statute which will produce a consequence directly opposite to the whole spirit of the statute should be avoided, *Postmaster General v. Early*, 25 U.S. 136, 12 Wheat. 136, 6 L.Ed. 577 (1827), for the general purpose of a statute is a more important aid to the meaning thereof than any rule of grammar or formal logic. *U.S. v. Shirey*, 359 U.S. 255, 79 S.Ct. 746, 3 L.Ed.2d 789 (1959).

As has been discussed hereinabove, the statute, read in its entirety, exhibits a strong purpose that witnesses should be fully compensated for their time and expenses in giving service as witnesses, and should not suffer any pecuniary losses as a result thereof. The "dollar-a-day" provision cannot be read in isolation from that spirit and purpose. A strict interpretation of the statute to mean that incarcerated witnesses should receive only one dollar per day is repugnant to the obvious general purpose and spirit of the statute to fully compensate witnesses. That purpose was also clearly expressed in the statute of 1853; yet, to give the same language the same interpretation today as it had then would defeat the purpose.

A statute cannot be divorced from the circumstances existing at the time it was passed and from the object of Congress in passing it. *U.S. v. Champlin Refining Co.*, 341 U.S. 290, 71 S.Ct. 715, 95 L.Ed. 949 (1951). When, in 1949, Congress re-adopted the language of the statute of 1853, the circumstances, economic and otherwise, existing in the Nation had changed considerably from what they were in 1853. In 1853, one dollar per day was adequate compensation; in 1949, this was no longer true. By 1968, when the per diem compensation was raised to [illegible] per day without alteration of the "dollar-a-day" provision, the concept of one dollar per day as adequate compensation had become laughable.

The same may be said of the fact that the statute uses the term "compensation" in the sentence dealing with the "dollar-a-day" provision. A thing may be within the letter of a statute, and yet not be within the statute itself, because it is not within the spirit thereof or within the intention of its makers. *National Woodwork Mfrs. Ass'n. v. N.L.R.B.*, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967). Here, it is obvious that the term

"compensation" was not intended to have its usual meaning of "full compensation", or the same meaning as the term "per diem" used in the title of the statute, but rather was used in the sense of "additional compensation," or to denote the fact that this payment was to be over and above, and separate and apart from, the "per diem" and "subsistence" allowances which had been previously spelled out. Indeed, the term "compensation" is not used in the first sentence of the statute, dealing with "per diem", as it had been in previous statutes, such as the statute of 1853.

Finally, it is submitted that the reasoning of the Court of Appeals, to the effect that the words "attending in any court" used in the first sentence of the statute are words of limitation which operate to exclude incarcerated witnesses from that portion of the statute, is incorrect.

Firstly, the reasoning is inconsistent with logic. Incarcerated witnesses are in jail for one reason and for one reason alone—in order that they will be available to testify for the Government in the court where the particular cause is pending. They are at the beck and call of the court. They remain in prison until they have fulfilled the purpose of the court and the Government. There is no logical explanation of their situation other than that they are "attending in" court. They are "attending in" court just as a witness who is waiting in his hotel room to be informed as to when he should appear is "attending in" court.

In this connection, the Court is asked to consider the following situation: a witness is called to testify in a pending criminal prosecution which is to be tried on Wednesday. He resides in the District of Columbia. He leaves from D.C. on Sunday morning and arrives by automobile in El Paso on Tuesday afternoon. He reports

to the office of the United States Attorney and is informed that the cause has been postponed and trial will not be convened until Friday morning. He is instructed to remain available at his hotel and to report on Friday morning if he is not called sooner. He reports on Friday morning, and is instructed to sit on the bench in the hall until he is called. He sits there all day, and late in the afternoon, he is informed that court is recessed until Monday morning, at which time it is expected that he will be called. He is not called until Tuesday afternoon, and after testifying he is excused. What compensation is he entitled to? Was he "attending in" court only on the day which he testified? It is submitted that he would, in fact, be paid $20 for each and every day which passed between the day he left and the day he returned to his home. It is further submitted that he would be so paid even if on the last day of his presence in El Paso the defendant decided to change his plea to a plea of guilty so as to do away with the necessity of his testimony. (The Government refused to answer interrogatories filed by Petitioners in the trial court directed at such a situation.)

Is there any logical basis on which to distinguish this situation from that of the witness waiting in jail to be called to testify?

In consonance with this logic, state courts have interpreted the phrase "attendance in court" to mean any period in which the person is not excused by the court itself and allowed to be engaged in ordinary vocations. *Words and Phrases*, Vol. 4a, p. 501; *Jacobs v. Elliot*, 37 P. 942, 104 Col. 318; *Ellis v. Degams*, 24 A. 579, 580, 17 R.I. 715; *Mason v. Culbert*, 41 P. 464, 108 Col. 247.

And, as has been discussed hereinabove, it was held in *Higginson's Case*, 2 Fed. Cas. 132, No. 6,471 (D.C. Cir 1802) that incarcerated witnesses are entitled to be compensated for each day of their incarceration.

Moreover, the statute of 1853 contained a similar phrase, "attendance in court," yet there is no question that the statute intended that incarcerated witnesses be compensated for each day of their incarceration.

In summation, therefore, the history of the legislation involved here, the language of the statute itself, recognized rules of statutory construction, logic and reason, fairness and justice, all compel an interpretation of the statute which requires the payment to incarcerated witnesses of the sum of twenty-one dollars per day for each day of their incarceration.

SECOND POINT OF ERROR

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE STSTUTE AS INTERPRETED BY THE COURT, DOES NOT DEPRIVE PETITIONERS OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(A) The Statute Deprives Petitioners of Just Compensation in Violation of the Fifth Amendment.

Argument and Authorities in Support of Point II (A)

Petitioners urged the lower Courts that if the statute must be interpreted to require the payment to incarcerated witnesses of only one dollar per day, then the statute is repugnant to the Fifth Amendment to the

Constitution of the United States insofar as it deprives Petitioners and the members of their class of just compensation for the deprivation of their liberty, and therefore of due process of law as guaranteed by that Amendment.

In rejecting this contention, the Court of Appeals reasoned, basically, as follows: first, that to hold that deprivation of liberty must be justly compensated is to imply that liberty may lawfully be deprived so long as it is justly compensated for; second, that the language of the Fifth Amendment creates a strict dichotomy between the "due process" protection and the "just compensation" protection, and liberty is not private property within the meaning of the "just compensation" clause, such that liberty and the ability to earn a living are protected only through the procedural guarantees of the "due process" clause; and third, that it would be difficult to contain within rational limits the theory that deprivation of liberty is to be compensated.

It certainly cannot be denied that the concept of compensation for deprivation of liberty is not a familiar one. Fortunately, non-criminal deprivation of liberty itself is not familiar in this Nation. However, this Court has never acknowledged any great gap between the concepts of Constitutional protections of liberty and those of private property, nor held that property is entitled to any more protection than liberty.

On the contrary, the Court recently said, in another context, the following:

"Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have

meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

This reasoning is consistent with earlier decisions recognizing that interdependence between personal rights and property rights. Thus, in *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) it was stated:

> "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."

It is established that a man's business, occupation, profession or calling is his property and is protected by the Constitution. *Slaughter House Cases*, 16 Wall. 36, 21 L.Ed. 394. Moreover, the right to sell or not to sell one's labor or services is not only a right of liberty, but a right of property, protected by the Constitution. *N.L.R.B. v. Local 74, United Brotherhood of Carpenters and Joiners of America, A.F. of L.*, 181 F.2d 126 (C.A. 6th Cir. 1950), affirmed 341 U.S. 707, 71 S.Ct. 966, 95 L.Ed. 1309.

Clearly, a day in the life of a working man is as much "property" to him as is an acre of land to a landholder. As stated by Justice Douglas in his concurring opinion in *Peters v. Hobby*, 349 U.S. 331, 75 S.Ct. 790, 99 L.Ed. 1129 (1955):

> ". . . one of man's most precious liberties is his right to work." 349 U.S. at 352.

The "interdependence . . . between the personal right to liberty and the personal right in property" spoken of in *Lynch* is clearly illustrated by the decisions of this

Court to the effect that when a government imposes restrictions upon one's *liberty* to use his property, and such restrictions are of great magnitude, that constitutes a "taking" of the property which cannot be permitted consistently with the guarantee of due process of law in the absence of just compensation, although the property itself is not in fact "taken" by the government, but rather its owner's liberty to use it is restricted. Thus, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court held unconstitutional a Pennsylvania statute which prohibited the mining of coal when such mining endangered the surface and surface structures, in a situation where the Petitioner held contractual rights to so mine and, if necessary, to damage the surface. The Court stated:

> "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts."

In decisions such as *Pennsylvania Coal* and its progeny lies the answer to the Fifth Circuit's concern over containing the theory of compensation for deprivation of liberty within rational limits. Not every restriction upon the use of private property is required by the Fifth Amendment to be compensated; only such restrictions as

are of such magnitude and extent as to logically permit them to be classed as a "taking" of the property. By the same token, it is unquestionable that not every governmental restriction upon personal liberty is compensable. Restrictions upon personal liberty are common in everyday life. For example, it is probable that the government could properly require an individual to appear and testify as a witness for the government without compensation.

In the case before the Court, however, the difference is the *magnitude* of the restriction upon liberty. Petitioners were locked behind bars. This is *complete* deprivation of liberty; it goes beyond mere restriction or inconvenience. Petitioners' liberty was taken, in a very real sense, for purposes of the government. A portion of the very lives of Petitioners was confiscated. Just as a man's property is "taken" when the government imposes restrictions upon his liberty to use the property to such an extent that the property is rendered without value, so a man's personal liberty

liberty is "taken" when he is placed behind bars. While he is incarcerated, his liberty is without value; indeed, he has no liberty.

It is true that there are situations where the actual taking of property by the government, in the literal rather than figurative sense, can be constitutionally valid even in the absence of compensation. This is so when the taking is necessary to the protection of the public health, safety and welfare in a sufficiently direct and immediate sense. For example, in *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), the Court upheld as constitutional an order for the destruction of privately-owned cedar trees without compensation,

insofar as the government of Virginia, in issuing the order, was combating a cedar-rust epidemic.

Again, as has been often said by the Court, the existence of such a situation as will permit the taking of property without compensation depends upon the facts of each case, and no set rule exists for such determination.

Similarly, there are situations in which it is clear that the government may completely deprive an individual of his personal liberty without providing compensation. Examples of such situations are: the involuntary commitment of a mentally ill individual, *Minnesota ex. rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744 (1940); and the involuntary commitment of an individual as a drug addict or alcoholic, *Re De La O*, 59 Cal.2d 128, 28 Cal. Rptr. 489, 378 P.2d 793 (1963), cert. den. 374 U.S. 856, 83 S.Ct. 1927, 10 L.Ed.2d 1076. In these situations, it is clear that the deprivation of liberty is so directly and immediately necessary for the protection of the public, as well as individual, health, safety and welfare as to justify it without compensation.

In the case before the Court, however, it is urged that no such direct and immediate relation to the public health, safety and welfare exists so as to justify the deprivation of Petitioners' liberty without compensation. Petitioners were incarcerated in order that they might be available to testify as witnesses for the government in a pending criminal prosecution. Presumably, their testimony might result in the conviction of a defendant charged with a federal crime. Obviously, any public benefit which might result from this is wholly indirect, and certainly not of sufficient proprotion to justify the

complete deprivation of liberty which Petitioners suffered without just compensation. No great public evil was avoided by Petitioners' incarceration, and no widespread public good was accomplished.

In summation, it is urged that personal liberty is on a level with "property" as that term is used in the Fifth Amendment, and where liberty is so completely deprived as it was here, in the absence of a direct, immediate and sufficiently great necessity for the protection of the public health, safety and welfare, the Fifth Amendment requires that such deprivation be justly compensated.

(B) The Statute Deprives Petitioners of "Substantive" Due Process of Law in Violation of the Fifth Amendment.

Argument and Authorities in Support of Point II (B)

If, in fact, there is a dichotomy between the "just compensation" and the "due process" clauses of the Fifth Amendment, it is urged that, nevertheless, the guarantee of due process of law embodies more than mere procedural protections, and if the fundamental justice which it guards requires payment of just compensation, then it will operate of its own force to so require.

It was said in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), that:

> "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' *Snyder v. Massachusetts* 291 U.S. 97,

105, or are 'implicit in the concept of ordered liberty.' *Palko v. Connecticut*, 302 U.S. 319, 325." 342 U.S. at 169.

The Court went on to refer to the guarantee of due process of law as protecting "immutable and fundamental principles of justice" and "respect (for) certain decencies of civilized conduct", and as protecting against "conduct that shocks the conscience," and "methods to close to the rack and screw" which "offend 'a sense of justice' ".

Similarly, in *Herbert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 71 L.Ed. 270 (1926), the guarantee was said to protect "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

The question here is whether in this day and age in the United States of America an individual may be incarcerated as a material witness and paid only one dollar for each day of such incarceration, in the face of the guarantee of due process of law.

An affirmative answer exhibits an utter disregard for the dignity of the human being and, indeed, for human life itself. In these times, an adequate and regular income is essential to the sustenance of life, the individual, and the family. To deprive a man of both his liberty and his necessary income is to strip him of all aspects of a free individual and human being.

If what was done to Petitioners was done to American citizens in a foreign country, we would surely term it an atrocity. It is no less an atrocity on our soil.

The framers of the Constitution had very much in mind the non-criminal incarcerations to which they and their families had been subjected, such as imprisonment for debt, and the consequences which it had upon the

lives and welfare of their loved ones. They surely intended, in drafting the Constitution, that the pages of American history would never reveal such harsh and shocking injustice as they had endured.

In short, it is urged that the guarantee of due process of law insures that the government may not wreak destruction upon individual lives and families as it has done here. This deprivation of liberty and livelihood violates fundamental principles of justice, is shocking to the traditions and conscience of the Nation, and offends the decencies of civilized conduct. Just compensation to Petitioners for the deprivation of their liberty which they were forced to endure is essential to the validity of their incarceration in accordance with the guarantee of due process of law, insofar as it is essential to their continued status as human beings rather than chattels or livestock, to be reluctantly fed until their purpose is fulfilled. If the government must deprive liberty in order to fulfill its functions, let it at least not deprive welfare.

The enforcement of one protection very often operates to give strength to other protections. In this case, the enforcement of the protection against deprivation of welfare will logically operate to avoid the consequence of the deprivation, illustrated by the cases of Petitioners Felipe Juarez Hurtado and Ramon Avila Hurtado, who were obviously forgotten in jail and allowed to languish there until such time as the government casually decided that it was ready for their services, almost three months after the date of their incarceration.

(C) The Statute Deprives Petitioners of Due Process of Law by Depriving Them of Equal Protection of the Law.

Although the Fifth Amendment contains no "equal protection" clause, as does the Fourteenth Amendment, an act of Congress which if passed by a state legislature would be violative of the guarantee of equal protection of the law contained in the Fourteenth Amendment, is violative of the guarantee of due process of law contained in the Fifth Amendment. *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 81 (1943); *Shapiro v. Thompson*, 394 U.S. 618, 642, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

Petitioners contended in the lower Courts that the statute, if interpreted to require the payment of only one dollar per day to incarcerated witnesses, was violative of the guarantee of due process of law insofar as it deprived then and the members of their class of equal protection of the law by providing for full and adequate compensation of non-incarcerated witnesses for their time spent in service as witnesses, including the time spent in travelling to and from court, while providing for the payment of only one dollar per day to incarcerated witnesses for the time of their incarceration.

In rejecting this contention, the Court of Appeals reasoned that the statute creates no inequity, insofar as it provides for the payment of twenty dollars per day to all witnesses while "attending in court", meaning, presumably, while present at the courtroom or actually testifying.

This reasoning is based on two assumptions which are improper: first, that incarcerated witnesses are paid the twenty dollars per day when they actually testify; and

second, that non-incarcerated witnesses are paid the twenty dollars per day only when they actually testify, or at least are present at the courtroom waiting to testify.

Petitioners alleged in their First Amended Complaint, paragraph X, as follows:

> ". . . the statute . . . provides for the payment of as much as thirty-six ($36.00) dollars per day for witnesses who are waiting to be called to testify in the comfort of their hotel room while it provides for only one dollar ($1.00) per day to those deprived of their freedom who are waiting for the same thing and for the same reason in the county jail. In this connection, Plaintiffs would show the court that the Government pays others called as witnesses the sum of twenty dollars ($20.00) per day for attending in Court and whether they are called to testify or not while it pays members of Plaintiffs' class the sole sum of one dollar ($1.00) per day even during the time that the court in which they are to testify in is actually in session and has called the specific case in which each is to testify. Plaintiffs further allege that on many occasions when they give statements and testify for the Government in other Administrative proceedings they are not paid the twenty dollars ($20.00) per day."

It must be remembered that the case never went to trial, but was disposed of by summary judgment, such that Petitioners were never granted the opportunity to prove these allegations. If, in fact, the issue of equal protection turns upon the truth or falsity of these matters, then summary judgment was improper, insofar as a fact issue existed in the case.

It is urged, however, that even assuming that the assumptions made by the Court of Appeals are correct,

nevertheless the reasoning of the Court does not justify the essential inequality of the statute.

It is undeniable that the statute creates two classes of witnesses for the purpose of compensation—incarcerated witnesses and non-incarcerated witnesses. The two classes are indistinguishable except for the fact that one is composed of witnesses who are free to come and go as they please and stay where they please, so long as they are present in court to testify when necessary, while the other is composed of witnesses who have been incarcerated upon the affidavit of a United States Attorney or other person that there is reason to believe that it may become impracticable to secure their presence at trial by subpoena, and upon their inability to give bail in the amount set by the court or commissioner to whom the affidavit is presented as security for their appearance.

Non-incarcerated witnesses are provided by the statute with a per-diem compensation of twenty dollars per day for all of the time which they spend in service as witnesses, including the time spent in travelling to and from the place where court is to be held. With regard to incarcerated witnesses, the statute provides for payment of only one dollar per day for the time they spend in jail awaiting the trial.

Thus, witnesses who are fortunate enought to have permanent residence at a place where they may be served with subpoena, or who have the financial means to give bail for their appearance, are fully and adequately compensated for all of the time which they spend in service as witnesses and in travel to and from the court, and leave the courthouse with a check for twenty dollars for each day of their time so spent, together with the

additional sum of sixteen dollars per day and ten cents per mile of travel if they came in from out of town. Witnesses who unfortunately are in a situation which subjects them to Rule 46 (b) and who are without the financial means to make bail are paid one dollar per day.

This is the inequity, and it cannot be answered by reasoning that incarcerated witnesses are paid twenty dollars per day for the day on which they testify, just as non-incarcerated witnesses. The fact that, by the government's own action and for its own purposes, incarcerated witnesses are deprived of more time and more liberty than non-incarcerated witnesses does not detract from the fact that the statute provides for full compensation of all of a non-incarcerated witness' time, but for almost no compensation for the time and liberty of an incarcerated witness.

It is well established that the Equal Protection Clause prohibits a government from establishing classifications for purposes of different governmental treatment of groups of persons, unless such classifications bear a rational relationship to some compelling governmental interest. *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). Thus, in *Graham v. Richardson*, the Court held unconstitutional an Arizona statute which denied welfare assistance to resident aliens who had not resided in the United States for a total of fifteen years or more. In *Shapiro v. Thompson*, the Court held unconstitutional statutes which existed in Connecticut, Pennsylvania, and the District of Columbia which denied welfare benefits to persons who had not resided within the state for at least one year, holding, *inter alia*, that a government may

legitimately attempt to limit its expenditures, but not by invidious distinctions between classes of persons, such that the saving of costs alone is not such a compelling state interest as to justify such discrimination.

With regard to this statute, it is urged that no rational basis exists for excluding incarcerated witnesses from the per diem compensation provided for non-incarcerated witnesses, and no compelling governmental interest is served thereby. The only conceivable explanation for the discrimination is that by reason of the fact that incarcerated witnesses are in jail for longer periods of time than non-incarcerated witnesses are present for trial, the government saves money by excluding incarcerated witnesses from the per diem compensation. As stated above, it was held in *Shapiro v. Thompson*, supra., that the saving of money by the government cannot justify an otherwise invidious classification. Thus, footnote No. 11 in the Court's opinion in *Shapiro*, 394 U.S. at 633, reads as follows:

> "In *Rinaldi v. Yeager*, 384 U.S. 305 (1966), New Jersey attempted to reduce expenditures by requiring prisoners who took an unsuccessful appeal to reimburse the State out of their institutional earnings for the cost of furnishing a trial transcript. This Court held the New Jersey statute unconstitutional because it did not require similar repayments from unsuccessful appellants given a suspended sentence, placed on probation, or sentenced only to a fine. There was no rational basis for the distinction between unsuccessful appellants who were in prison and those who were not."

So it is here. There is no rational basis for distinction between witnesses who are in jail and those who are not. In fact, there is less of a basis than there was in *Rinaldi*, for Petitioners are not criminals to be punished for some wrongdoing.

Moreover, the classifications established by the statute, on their very face, are based upon a discrimination between the solvent and the indigent. A witness who is financially able to give security for his appearance will remain free, and when he is called to appear, he will be paid twenty dollars for each day of his time spent as a witness. It is clear that the intention of the statute is that he be so paid even if he were to wait in his hotel for a week or a month to be called, and then be dismissed without having testified. On the other hand, a witness who has no funds with which to give security for his appearance must wait in jail for trial, and receives only one dollar per day.

In addition, Petitioners alleged that they and the members of their class are Mexican aliens, and that the statute is applied primarily, if not exclusively, against Mexican aliens. Although the statute does not, by its terms, limit the class of witnesses deprived of per diem compensation to aliens, it is only logical that this is its effect, insofar as aliens are the most likely persons who will not be available for trial and whose presence cannot be secured through subpoena. The fact that Petitioners and the members of their class are aliens does not deprive them of the protection of the Equal Protection Clause; on the contrary, it is submitted that this fact renders the statutory classification a "suspect" classification such as that in *Graham v. Richardson*, supra. As such, the classification must be presumed invidious in the absence of a demonstration of a rational connection to a compelling governmental interest in its creation.

In terms of rationality, it certainly would have been more rational to grant the per diem compensation only to incarcerated witnesses, and to deny it to free witnesses,

insofar as the deprivation of liberty, or rather the restriction thereof, suffered by non-incarcerated witnesses is slight in comparison to that suffered by incarcerated witnesses. The reverse situation is devoid of rationality.

The consequences of the discrimination imposed by the statute are not a mere "mischief," as concluded by the Court of Appeals, which the government may pursue with "partial solutions." The consequences are grave, harsh and unust. On the sole basis of their incarceration, Petitioners are denied the compensation granted to other witnesses, upon which "may depend the ability of (their) families to obtain the very means to subsist—food, shelter, and other necessities of life." *Shapiro v. Thompson*, supra., 394 U.S. at 627.

For these reasons, it is urged that the statute, in excluding incarcerated witnesses from receiving the twenty-dollar-per-day per diem compensation, deprives Petitioners of equal protection of the law, and therefore of due process of law, as guaranteed by the Fifth Amendment.

THIRD POINT OF ERROR

III.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATUTE, AS INTERPRETED, DOES NOT CREATE AN INVOLUNTARY SERVITUDE IN CONTRAVENTION OF THE THIRTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Argument and Authorities

Petitioners contended in the lower courts that the statute, as interpreted by those courts to require payment of only one dollar per day to incarcerated witnesses, is violative of the Thirteenth Amendment's prohibition against involuntary servitude.

In rejecting this contention, the Court of Appeals reasoned that it is not uncompensated service, but involuntary servitude which is prohibited by the Thirteenth Amendment, and cited various examples of governmental restrictions upon liberty which do not constitute involuntary servitude.

It is submitted that here, again, the Court of Appeals failed to give proper consideration to the *degree* of the deprivation of liberty Petitioners underwent. This goes beyond mere inconvenience or restriction; this is complete and absolute deprivation of liberty. This is incarceration for the government's own purposes and for no other purpose. Petitioners were deprived of a portion of their lives and livelihood, and therefore of their welfare, in order that they would be available to serve the government.

Petitioners recognize that involuntary servitude is violative of the Constitution regardless of whether or not

it is compensated. It does not follow, however, that compensation cannot be a requirement of the guarantee against involuntary servitude, or that involuntary servitude cannot be the result of the absence of compensation.

Petitioners have not disputed the government's interest in having them available to testify in pending criminal prosecutions. The question is whether that interest is sufficient, without more, to remove Petitioners' incarceration from the prohibition of involuntary servitude.

The Thirteenth Amendment is not only a prohibition of slavery in the literal sense, but an absolute declaration that the badges and incidents of slavery shall not exist in the United States. *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968).

The primary object of the Amendment, of course, was to abolish the condition of slavery to which people of the Negro race had been subjected in the early days of the Nation. It is highly doubtful that the Court will ever be faced with another case of such obvious slavery. It is urged, however, that this does not mean that the Amendment is obsolete. It continues to stand as a guarantee against the degradation, debasement, and subjugation of the human being.

Petitioners' incarceration would unquestionably meet the strictest definition of involuntary servitude, in the absence of a governmental interest therein. Petitioners contend, however, that such interest is insufficient to expunge their incarceration of its character as involuntary servitude. Petitioners suffered more than the confiscation

of their persons and their liberty. They suffered deprivation of the livelihood and welfare for themselves and their families. They were stripped of the ability to sustain life itself. For them, the natural and probable consequence of the statute was to reduce them to the state of paupers. This is more than deprivation of liberty—it is degradation and debasement. The statute embodies and imposes utter disregard for human dignity and well-being. It operates to render incarcerated witnesses mere chattels, with which the government may do as it pleases. As such, it creates and requires the existence of one of the essential characteristics of slavery—disrespect for and degradation of human life. Surely, if the Thirteenth Amendment has meaning at all, it must mean that government may not rape human beings of their welfare and dignity in this manner.

It is therefore clear that the one element which may raise Petitioners' loss of liberty above the level of slavery is the payment of just compensation. In depriving Petitioners of such compensation, the statute violates the prohibition of involuntary servitude of the Thirteenth Amendment.

FOURTH POINT OF ERROR

IV.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT CORRECTLY DENIED PETITIONERS' REQUEST FOR A THREE-JUDGE COURT.

Argument and Authorities

Petitioners sued in the District Court, individually and as members of a class, to recover witness' fees alleged to be due to them in accordance with the provisions of 28 U.S.C. section 1821, and in the alternative, to enjoin the operation of that statute as repugnant to the Constitution, and for other relief. Petitioners requested the convening of a three-judge district court to hear the cause, in accordance with 28 U.S.C. section 2282, which provides that an injunction restraining the enforcement, operation or execution of any act of Congress may be granted only by a three-judge district court.

In obvious reliance upon the "Poresky doctrine", established in *Ex Parte Poresky*, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1933), the District Court denied Petitioners' application for a three-judge court, concluding that the pleadings failed to raise a substantial constitutional question.

The Court of Appeals affirmed this action of the District Court, invoking the "Poresky doctrine" and also concluding that the federal questions presented were insubstantial.

It is submitted that the "Poresky doctrine" has no application here. In *Ex Parte Poresky*, supra., it was held that where there is no diversity of citizenship jurisdiction,

and jurisdiction depends upon the existence of a substantial federal question, the single judge may determine the initial jurisdiction of the district court before calling for the convening of a three-judge court by making a determination as to whether or not the constitutional claim asserted is obviously without merit or its unsoundness clearly results from previous decisions of the Supreme Court. The Court made it clear that the doctrine is to operate only in those situations where the initial jurisdiction of the district court depends upon the existence of a substantial federal question, in the following language:

> " . . . the District Judge clearly has authority to dismiss for the want of jurisdiction when the question lacks the necessary substance *and no other ground of jurisdiction appears.*" 290 U.S. at p. 32. (emphasis supplied)

This is a perfectly logical decision. Where jurisdiction depends upon the existence of a federal question, neither the single judge nor a three-judge court will have jurisdiction if the claim of unconstitutionality of the statute is plainly insubstantial, and therefore the convening of a three-judge court can be appropriately avoided by permitting the single judge to make the initial determination as to the necessary substance of the federal question, and therefore as to jurisdiction. However, it is clear that the decision is not a sweeping grant of authority to the single judge to decide the merits of every case where a three-judge court is requested, and it is clear that where initial jurisdiction does not depend upon the existence of a federal question, the doctrine has no application.

In this case, Petitioners did not invoke the jurisdiction of the District Court based upon 28 U.S.C. section 1331,

the "federal question" statute, but rather they invoked jurisdiction upon 28 U.S.C. section 1346 (a) (2), as a claim for money against the United States. Insofar as initial jurisdiction did not depend upon the existence of a federal question, the doctrine has no application to the case.

It is recognized that decisions subsequent to *Poresky* have indiscriminately applied the doctrine of that case to all cases involving applications for a three-judge court. It is urged, however, that the *Poresky* decision clearly does not contemplate such a result, and its logic cannot be extended to those cases in which initial jurisdiction does not depend upon a federal question. Otherwise, the three-judge court statute is rendered meaningless.

In addition, the District Court here did not merely determine that it was without jurisdiction and dismiss the cause for want thereof; it proceeded to determine the merits of the case and render summary judgment for the Government. Whatever the meaning of the Poresky doctrine, it certainly does not authorize a single judge to hear, determine, and render judgment upon the merits.

Nevertheless, assuming that the District Court was authorized here to determine whether the constitutional questions involved are substantial, it is submitted that the determination made was erroneous.

Unless the constitutional questions involved are *plainly* insubstantial, as where a previous decision of this Court has decided the particular issue in the same context in favor of constitutionality, the district judge is powerless to decide the merits, and must convene a three-judge court. *Schneider v. Rusk*, 372 U.S. 224, 83 S.Ct. 621, 9 L.Ed.2d 695 (1963).

In this case, as has been illustrated hereinabove in the argument concerning the constitutional issues, those issues are not plainly insubstantial. Indeed, most of them are questions of first impression, and certainly no decision of this Court has squarely decided them. The Court of Appeals found it necessary to write an extensive opinion to support its conclusion that the questions are insubstantial, which, of itself, illustrates their substance.

For these reasons, the District Court erred in overruling Petitioners' application for a three-jjudge court, and the Court of Appeals erred in affirming that action.

CONCLUSION

For the reasons stated herein, Petitioners respectfully pray that this Honorable Court reverse the judgments of the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Western District of Texas, El Paso Division, in this cause, and render judgment in favor of Petitioners as prayed for in their Complaint and Motion for Summary Judgment in the trial court; or, in the alternative, that the Court reverse said judgments and remand the cause for trial before a three-judge court; or, in the alternative, that the Court reverse said judgments and remand the cause for trial before a single judge.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6742

FELIPE JUAREZ HURTADO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 40–46) is reported at 452 F. 2d 951.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1971 (App. 47). A petition for rehearing was denied on March 1, 1972 (App. 48). The petition for a writ of certiorari was filed on May 30, 1972, and was granted on October 10, 1972 (App. 49). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the witness fee provisions of 28 U.S.C. 1821 entitle petitioners, deportable Mexican aliens, to the payment of twenty-one dollars per day for time spent in custody as material witnesses.

2. Whether, if the statute does not authorize such payment, its payment provisions are unconstitutional as applied to the petitioners.

STATUTES INVOLVED

28 U.S.C. 1821 provides:

> § 1821. Per diem and mileage generally; subsistence.
>
> A witness attending in any court of the United States, or before a United States Commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $20 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 10 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $16 per day for expenses of sub-

sistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided,* That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further,* That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day.

Witnesses in the district courts for the districts of Canal Zone, Guam, and the Virgin Islands shall receive the same fees and allowances provided in this section for witnesses in other district courts of the United States.

Rule 46 of the Federal Rules of Criminal Procedure provides in pertinent part:

* * *

(b) Bail for Witness.

If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody

of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

18 U.S.C. 3149 provides:

§ 3149. Release of material witnesses.

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

INTRODUCTION AND STATEMENT

This is a civil suit brought by petitioners in the United States District Court for the Western District of Texas. They sued on behalf of themselves and the alleged class of deportable Mexican aliens held as material witnesses and paid only one dollar per day of confinement (App. 28–30, 35–36). Petitioners contended that 28 U.S.C. 1821 should be construed to require payment of a total of $21 per day to material witnesses in custody, or in the alternative that the dollar per day limitation should be found unconsti-

tutional as a denial of Fifth Amendment rights to just compensation, due process, and equal protection and as the imposition of involuntary servitude in violation of the Thirteenth Amendment. They sought money damages under the Tucker Act, 28 U.S.C. 1346(a)(2), as well as declaratory and injunctive relief (App. 31–32).

This case was submitted and decided on cross-motions for summary judgment, since all that was at issue were questions of law. The underlying facts—that petitioners are Mexican aliens who entered the United States illegally and were deportable as such and were, for a period prior to deportation, held as material witnesses in the prosecution of the persons who smuggled them into this country—were not placed in issue by the pleadings. Although we do not suggest that additional facts are in any way necessary to the resolution of the case at this stage, we believe the Court may find pertinent some additional information on the background of the case. The following statement is based on certified public records "whose accuracy cannot reasonably be questioned," including the files of the district court in which this suit was brought; these facts therefore seem to be an appropriate subject for judicial notice. See Rules 201 (b)(2) and (d) of the new Federal Rules of Evidence, which express the prevailing practice. The background facts, which will be discussed briefly below, are set forth in two sets of papers we are lodging with the Clerk: (1) certified copies of documents on file in the United States District Court for the Western Dis-

trict of Texas [1] and (2) a certified resume of administrative processing of petitioners by the Immigration and Naturalization Service. These consecutively paginated documents are hereinafter referred to as "D. 1" through "D. 21." [2]

1. Petitioners Felipe Juarez Hurtado and Ramon Avila Hurtado

Petitioners Felipe Juarez Hurtado and Ramon Avila Hurtado, along with others including Thomas Lopez and Santos Casarez, were apprehended by United States Immigration and Naturalization Service Border Patrol agents near Alpine, Texas, on March 8, 1970 (D. 6). On the same day, after admitting to the arresting officers that they had entered the United States without inspection, in violation of 8 U.S.C. 1251(a)(2), both Felipe and Ramon Hurtado were served with an Order to Show Cause why they should not be deported, Notice of Hearing, and Warrant for Arrest, and were taken to the El Paso Immigration and Naturalization Detention Facility, El Paso, Texas, where they were detained, having been unable to post a bond of $1,000 (D. 19).

On March 9, 1970, a criminal complaint was filed against Lopez and Casarez in the United States District Court for the Western District of Texas (D. 6) charging them with the felony of knowingly smuggling

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[1] The documents are on file in the cases of *United States* v. *Casarez* and *Lopez*, P-70-CR-55; *United States* v. *Ramon Avila Hurtado*, P-70-CR-63; *United States* v. *Felipe Juarez Hurtado*, P-70-CR-64; *United States* v. *Herrera*, EP-70-CR-537.

[2] Copies of these lodgings are being furnished to counsel for petitioners.

aliens into the United States, in violation of 8 U.S.C. 1324(a)(2). On March 19, 1970, an information was filed against petitioners Felipe and Ramon Hurtado, P–70–CR–63, charging them with illegally entering the United States in violation of 8 U.S.C. 1325 (D. 10, 11). Consequently, the Hurtados were remanded to the custody of the United States Marshal (D. 19). On March 18, 1970, the Hurtados were advised that pursuant to their request, and based on their admissions of illegal entry and the provisions of 8 U.S.C. 1252 (b), they were granted the privilege of voluntary departure from the United States and the administrative deportation hearing previously scheduled was taken off the calendar (D. 19). On March 26, 1970, the Hurtados pleaded guilty to the misdemeanor of illegal entrance (8 U.S.C. 1325) and they were sentenced to six months' imprisonment, the execution of which was suspended, and they were put on unsupervised probation for one year (D. 10, 11).

On March 18, 1970, a superseding information was filed against Lopez and Casarez (P–70–CR–55), charging them in three counts with aiding and abetting the illegal entry of the Hurtados and another alien, in violation of 8 U.S.C. 1325 and 18 U.S.C. 2 (D. 1). Based on an affidavit filed in accordance with Rule 46(b), Fed. R. Crim. P., which recited that the Hurtados were essential and material witnesses and that it appeared "impractical to secure their presence by subpoena at such time as the case is called for trial for the reason that they will be without the jurisdiction of the United States," the United States Com-

missioner, on March 26, 1970, committed them to the custody of the United States Marshal for failure to post adequate bond, pending final disposition of the case against Lopez and Casarez (App. 20, D. 3). On June 15, 1970, Casarez and Lopez pleaded guilty to three counts of the information (D. 1).[3] That same day, petitioners Felipe and Ramon Hurtado were released by the United States Marshal to the custody of the Immigration and Naturalization Service, paid $1.00 per day for each day of their incarceration and, pursuant to their prior request for voluntary departure, were escorted, under safeguard, to Mexico on June 18, 1970 (App. 6, D. 19).

2. Petitioners Victor Gaucin Lazalde, Enrique Gaucin Lazalde, and Jorge Miranda Gaucin

Petitioners Victor Gaucin Lazalde, Enrique Gaucin Lazalde, and Jorge Miranda Gaucin, along with two unknown Mexican aliens and Abe Herrera, were apprehended by Border Patrol agents near El Paso, Texas, on May 25, 1970 (D. 15).[4] The Lazaldes and Gaucin all admitted to the arresting officers that they had entered the United States on May 22, 1970, near El Paso, Texas, without inspection, in violation of 8 U.S.C. 1251(a)(2) (D. 20). On the same day, a crim-

[3] They were each sentenced to three consecutive six month prison sentences, suspended on five years' probation and the payment of $1,500 in fines (D. 2).

[4] Enrique Gaucin Lazalde was a named plaintiff in the district court; he was not named as an appellant in the court of appeals or as a petitioner in this Court, but counsel for petitioners advises us that this omission was inadvertent. We shall treat him as a co-petitioner.

inal complaint was filed against Herrera in the United States District Court for the Western District of Texas charging him with knowingly and unlawfully aiding and abetting the illegal entry of these Mexican aliens into the United States, in violation of 8 U.S.C. 1325 and 18 U.S.C. 2 (D. 15). On May 26, 1970, both the Lazaldes and Gaucin were served with an Order to Show Cause why they should not be deported, Notice of Hearing, and Warrant for Arrest and taken to the El Paso Immigration and Naturalization Service Detention Facility, El Paso, Texas, where they were detained, having been unable to post a bond of $1,000 (D. 20).

On June 3, 1970, an information was filed against Herrera, EP-70-CR-537, charging him in three counts with aiding and abetting the illegal entry of the Lazaldes and Gaucin, in violation of 8 U.S.C. 1325 and 18 U.S.C. 2 (D. 12). Based on an affidavit filed in accordance with Rule 46(b), Fed.R.Crim.P., which recited that the Lazaldes and Gaucin were essential and material witnesses and that it appeared "impractical to secure their presence by subpoena at such time as the case is called for trial for the reason that they will be without the jurisdiction of the United States," the United States Commissioner, on June 11, 1970, committed them to the custody of the United States Marshal for failure to post adequate bond, pending final disposition of the case against Herrera (App. 21, D. 3).

On June 29, 1970, the Lazaldes were notified that their prior request for voluntary departure, based on

their admissions of illegal entry and the provisions of 8 U.S.C. 1252(b), had been granted and that their deportation hearings were therefore cancelled (D. 20). On July 8, 1970, Herrera pleaded guilty to all three counts of the information filed against him.* The next day the Lazaldes were released by the United States Marshal to the custody of the Immigration and Naturalization Service and were escorted to Mexico (D. 20).

On June 29, 1970, Gaucin, who had been previously granted voluntary departure from the United States under escort on May 17, 1970, and had then illegally reentered this country on May 22, was notified that his deportation hearing was scheduled to be held on July 17, 1970 (D. 20–21). On July 9, 1970, the day after Herrera entered his guilty plea, Gaucin was released by the United States Marshal to the custody of the Immigration and Naturalization Service. At his deportation hearing on July 17, 1970, he was ordered deported, and on July 18, 1970, he was deported (D. 21).

3. This Action

The case before this Court had its genesis when petitioners Felipe and Ramon Hurtado filed a motion on May 8, 1970, to intervene in the criminal prosecution against Casarez and Lopez seeking payment of witness fees of $21 rather than one dollar (D. 1). After a hearing, petitioners' motion was denied.

* On August 27, 1970, Herrera was sentenced to a $300 fine and three concurrent three-month prison terms, the execution of which was suspended upon payment of the fine, and he was placed on probation (D. 12).

Thereafter on July 2, 1970, petitioners brought an independent civil action in the same district court contending that, under 28 U.S.C. 1821, they and the class they allegedly represented were entitled to be compensated at the total rate of $21 per day rather than one dollar while incarcerated as material witnesses and that if the statute is construed to authorize the payment of only one dollar, it is unconstitutional (App. 4). Petitioners alleged that the class they represented consisted of Mexican aliens who had been paid or would be paid the sum of one dollar per day for their incarceration as material witnesses on behalf of the government, and had been or would be thereafter summarily deported to Mexico (App. 29, 36).

In its answer, the government averred that petitioners are Mexican aliens who had illegally entered the country and were held as material witnesses in connection with the criminal charges against the persons alleged to have smuggled them into the country or illegally transported them (App. 20–21, 23–24). The government also defended the dollar-a-day construction of 28 U.S.C. 1821 and the constitutionality of the statute as so construed. After a hearing held on December 14, 1970 (R. 22), the trial court took under advisement the government's motion for summary judgment (App. 25) and petitioners' cross-motion for summary judgment (App. 34) and their motion for a three-judge court (App. 36). On April 8, 1971, the trial court overruled petitioners' motion for a three-judge court on the ground that no substantial federal question was presented (App. 38), and granted sum-

mary judgment for the government (App. 39). The court of appeals affirmed, finding that a witness in custody is not entitled under 28 U.S.C. 1821 to the $20 witness fee, in addition to the one dollar per day, when not in attendance in court, and also held that the statute as so construed is constitutional (App. 40–46).*

SUMMARY OF ARGUMENT

The plain language of 28 U.S.C. 1821 provides only one dollar per day to detained witnesses while they are not in attendance in court. The $20 per diem provided by the first paragraph of the section is only available to witnesses, whether incarcerated or not, while they

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*The government opposed (App. 4, 20) petitioners' request (App. 28–30, 33, 35–36) that the district court declare that the suit was properly brought as a class action under Rule 23 of the Federal Rules of Civil Procedure. The district court never explicitly ruled on the Rule 23 issue and the court of appeals did not discuss it. We note, however, that aggregation of the claims of the individual members of petitioners' purported class would place the amount of money damages sought well over the $10,000 subject-matter jurisdictional limit on the district court's power under the Tucker Act, 28 U.S.C. 1346(a)(2), to hear such claims. It could be argued, therefore, that the suit should properly have been brought in the Court of Claims. 28 U.S.C. 1491; *United States* v. *Sherwood*, 312 U.S. 584, 587. Compare *Snyder* v. *Harris*, 394 U.S. 332. But it is uncertain whether the Court of Claims, which has ruled that it has jurisdiction to accept class actions but is not required to do so, would accept jurisdiction here. See *Quinault Allottee Ass'n* v. *United States*, 453 F. 2d 1272. Since this question was not raised in or passed upon by the courts below, we do not discuss the matter further.

are actually in attendance in court or before a magistrate or a person authorized to take a deposition. Significantly, the one dollar per day provision, while stating that it is in addition to subsistence, does not state that it is in addition to the $20 per diem fee. The legislative history of the statute confirms that Congress did not intend to pay a total of $21 per day for detained witnesses while they are not in actual attendance in court.

The one dollar per day fee is constitutional as applied to the petitioners. Petitioners do not question the constitutionality of their detention as material witnesses but merely the constitutionality of their payment of only $1 per day while being detained. Congress and this Court have long recognized that the duty to appear in court is a public duty and not a compensable taking requiring just compensation. Nor were petitioners denied equal protection of the laws. The named petitioners and the class they purport to represent are illegal entrants into the United States subject to criminal charges and deportation. While actually attending in court they receive the same fee as anyone else. It was rational for Congress to provide a smaller payment for witnesses while detained but not attending in court than while attending in court. This is particularly reasonable when applied to petitioners because a payment of $21 per day to illegal entrants would constitute a windfall that might encourage illegal entrance into the United States.

491-713—72—3

ARGUMENT

I. 28 U.S.C. 1821 REQUIRES PAYMENT OF ONLY $1 PER DAY TO DETAINED WITNESSES WHILE THEY ARE NOT IN ATTENDANCE IN COURT

As the court of appeals pointed out (App. 42), petitioners have not challenged the validity of requiring material witnesses to furnish bail or the validity of incarcerating witnesses who are unable to furnish sufficient assurance of appearance. These practices, moreover, have long been upheld by this Court as necessary to assure the presence of witnesses at trial. *Blair* v. *United States*, 250 U.S. 273; *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597. The ultimate issue in the case, therefore, is a relatively limited one: whether petitioners were entitled to a total of $21 a day while they were in custody as material witnesses but not actually in attendance to give trial or deposition testimony, or whether they were entitled only to the one dollar per day they were paid. The threshold question, therefore, is one of statutory construction.[1]

Petitioners argue that while confined in a civil jail awaiting the need for their testimony, they should have been credited with the $20 per day witness fee authorized by 28 U.S.C. 1821 "for each day's attendance" "in any court of the United States," in addi-

[1] A legislative proposal by the Department of Justice to increase the per diem payment to detained witnesses will shortly be sent to the Office of Management and Budget for review.

tion to the "compensation of $1 per day" provided by the statute for "a witness [who] is detained in prison for want of security for his appearance * * *."

The plain language of Section 1821 precludes this construction. The section carefully distinguishes between two categories of witnesses. One category consists of witnesses actually "attending *in* any court of the United States, or *before* a United States Commissioner, or *before* any person authorized to take his deposition * * *." Those witnesses are entitled to a fee of $20 "for each day's attendance and for the time necessarily occupied in going to and returning from the same * * *." The other category applies to persons who are *not* in attendance or in direct transit and who therefore do not qualify for the fees. This category consists of material witnesses, like petitioners, who must be detained in custody until it is necessary for them to be brought to "attend in court."

> Where a witness is detained in prison for want of security for his [personal] appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day.

Significantly, the provision does not provide that the one dollar is *in addition* to the per diem fee—except of course for those days when the detained witness is actually in attendance—but instead it provides that the one dollar per day is the material witness's "compensation." The uniform construction of this provision in administrative application has been that the detained witness is entitled *only* to one

dollar per day, except when he is actually produced in court for testimony.[8]

This interpretation of Section 1821 is confirmed by its legislative history, which shows that Congress did not intend to provide more than one dollar per day to incarcerated witnesses when not actually attending in court. Petitioners' statutory argument appears to be that the various changes in the witness fee statutes manifest a congressional design to provide full compensation to a person for performing his public duty. This alleged objective, they argue, was originally accomplished by providing a dollar per day to a detained witness in the 1850's when that payment was first introduced. That amount, it is said, then represented

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[8] The Department of Justice, United States Marshal's Manual 340.20 (1971), provides in pertinent part:

Witnesses—Detained Witnesses.—When a witness is detained in prison for want of security for his appearance, he is entitled, in addition to his subsistence, to a compensation of $1 per day (28 U.S.C. 1821). Such persons, upon release, may be furnished with transportation and subsistence to the place of arrest or to the place of bona fide residence, if such cost is not greater than to the place of arrest (18 U.S.C. 4282).

Witnesses detained under Rule 46(b) of the Federal Rules of Criminal Procedure should be paid the compensation of $1 per day, except for the days they attend in court when they are entitled to the regular witness fee of $20.

See, also 28 C.F.R. 21.3(d), issued under the Attorney General's statutory power to set witness fees for federal courts in Alaska, which authorizes compensation to detained witnesses at the $1 per diem rate in Alaska, and specifically excepts detained witnesses from receiving the general witness fees authorized under §§ 21.3(a) and 21.3(b) of that regulation.

a fair day's wages. But that amount today, petitioners contend, is no longer reflective of a fair day's wage and thus Congress should be regarded as intending to provide that sum *in addition* to the $20 per diem fixed for witnesses in attendance in court or in transit, thus providing the detained material witness with a total of $21 for every day he is under court order, including the days in which he is neither in court nor travelling to or from court. The major premise here—that witness fees are designed to provide actual compensation for average lost wages—is faulty. The history of these provisions shows that Congress has not considered it necessary or feasible to insure a witness against lost earnings.

The incarceration of material witnesses unable to post bond sufficient to assure their eventual appearance was authorized by the Judiciary Act of September 24, 1789, c. 20, § 33, 1 Stat. 91, passed by the First Congress. The Act provided:

> * * * copies of the process shall be returned as speedily as may be unto the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment. * * *

The First Congress did not enact any specific provision providing for compensation to detained witnesses, except to state in the Act of September 29, 1789, c. 21, § 2, 1 Stat. 93, that:

> * * * modes of process and rates of fees * * * shall be the same in each state respectively as

are now used or allowed in the supreme courts of the same. * * *

Although the Fourth and Fifth Congress did authorize compensation to witnesses "attending in the courts of the United States," Act of June 1, 1796, c. 48, § 2, 1 Stat. 492; and Act of February 28, 1799, c. 19, § 6, 1 Stat. 626, no specific provision authorizing payment to detained witnesses was made until 1853. The 1853 Act, c. 80, § 3, 10 Stat. 167, provided for a payment to witnesses of $1.50 per day while attending court (and 5 cents per mile travel expense) and "[w]hen a witness is detained in prison for want of security for his appearance, he shall be entitled to a compensation of one dollar per day over and above his subsistence."

Except for special legislation for certain western states and territories (Act of May 27, 1908, c. 200, 35 Stat. 317, 377), fees to witnesses remained at the amount fixed in 1853 until 1926. In 1926 Congress provided that a witness attending in court was to receive $2 for each day's attendance and 5¢ per mile for going back and forth from his residence (c. 183, §§ 1–3, 44 Stat. 323–324).* By its explicit language, Section 1 of this Act

* Section 3 of the Act provided in pertinent part:

> Witnesses attending in such courts * * * shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the same $2, and 5 cents per mile for going from his or her place of residence to the place of trial or hearing and 5 cents per mile for returning: *And provided further*, That witnesses (other than witnesses who are salaried employees of the Government and detained witnesses) in the United States courts, * * * who attend court * * * at points so far removed from their respective residences as to prohibit return thereto from day to day,

excepted all detained witnesses from the fees provided to witnesses for subsistence.[10] No provision was made for any payment at all to detained witnesses for the days spent in custody but not in actual attendance in court or in actual transit.

The House Judiciary Committee Report on the 1926 changes made it clear that Congress recognized no obligation to furnish full compensation to witnesses even for the days of actual attendance. See House Report No. 308, 69th Cong. 1st Sess. 2–3:

> While no attempt has been made in this bill to pay jurors or witnesses a sum that would be a remuneration for the time which they give to the courts in aid of the administration of justice, the committee sought to fix a sum that would relieve the situation which at present exists. Formerly there was nothing paid either to witnesses or jurors. Service as a juror is a public duty and the juror is expected to make a sacrifice in discharge of his patriotic obligation as a good citizen. Likewise, every man owes a

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shall, * * * be entitled, in addition to the compensation provided by existing law, as modified by this Act, to a per diem of $3 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to attend court and return home.

[10] Section 1 provided in pertinent part:

That jurors and witnesses (other than witnesses who are salaried employees of the Government, *and detained witnesses*) in the United States court, * * * who attend, * * * *shall be entitled to a per diem for each day of actual attendance* and for each day necessarily occupied in traveling to attend court, * * * and return home, and, in addition, mileage as hereinafter provided. [emphasis added.] See, also, 28 U.S.C. (1940 ed.) 600a, 600b.

nesses) in the United States court, * * * who attend, * * *

duty to society to testify as to facts within his knowledge in connection with matters in litigation, even though it involves a personal sacrifice. The reciprocal obligation resting upon every citizen furnishes a compensation. It is one man's duty to-day and his neighbor's to-morrow.

This bill does not provide compensation nor give a bounty for jury service or service as witnesses, but merely provides fees that will approximately take care of necessary expenses. The fees fixed were arrived at after much discussion and careful deliberation. The fixing of an amount is not an easy task. The result as declared in the bill is regarded as a prudent adjustment. [Emphasis added.] [11]

A variety of changes in the *per diem* fee schedule took place in 1932, 1935 and 1942 but with no change in the philosophy of setting a figure *not based* on true compensation.[12] When the Judicial Code was revised in 1948, the provision of per diem allowances to witnesses was covered by Section 1821. 62 Stat. 950. Two dollars a day was fixed as the fee for attendance in

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[11] See also the statements of the sponsor of the bill, Congressman Burtness in the Hearings before the House Judiciary Committee, Serial 5, Fees of Witnesses and Jurors, 69th Cong., 1st Sess., February 5, 1926, 6-7.

[12] The Act of June 30, 1932, c. 314, § 323, 47 Stat. 413, reduced the per diem fee authorized to be paid to witnesses from $2.00 to $1.50 and suspended entirely the subsistence fee. The Act of March 22, 1935, c. 39, § 3, 49 Stat. 105, restored the subsistence fee, and the Act of December 24, 1942, c. 825, § 3, 56 Stat. 1088, again increased the per diem fee to $2.00. See 28 U.S.C. (1940 ed.) 600, Temporary Reduction of Fees; 1949 U.S. Code Cong. Serv. 1232.

court, but again no provision was made for any payments to be made to witnesses being detained for future appearances.

The next year, however, the dollar per day payment to confined witnesses was reintroduced, 63 Stat. 103, following a committee explanation that it had been "inadvertently omitted" from the codification. House Rep. No. 352, 81st Cong., 1st Sess. 16. By a separate measure, the per diem witness fees were increased to seven dollars a day, with an explanation that reflected a legislative desire to pay a reasonable sum to persons appearing as witnesses but one not necessarily corresponding to their actual wages. See Senate Report No. 187, 81st Cong., 1st Sess., on the Act of May 10, 1949, c. 96, 63 Stat. 65, which stated in part:

> The mere statement of the fact that the present fee for witnesses is $2 per day, subsistence is $4 per day, and the mileage is 5 cents per mile points up the present inadequacy of such amounts to fairly compensate the individual either for his time or expenses incident to his service as a witness. It is unreasonable to expect and require witnesses to attend court at a personal financial loss.
>
> The amounts arrived at in this bill are considered to be more fair than presently existing amounts, although it is recognized that certain witnesses will not, under the proposed rates, be adequately compensated. In order to fairly compensate everyone appearing as a witness it would be necessary to have either a graduated scale of fees, or, leave the amount of such fees in the discretion of the judge. Neither was con-

> sidered feasible, and therefore the amounts arrived at herein are more or less arbitrary, but considered to be reasonably fair to the average witness.

Senate Report No. 2732, 84th Cong., 2d Sess., dealing with the Act of August 1, 1956, c. 826, 70 Stat. 798–799, which increased the subsistence fee to $8 per day, increased the travel allowance to 8 cents per mile and explicitly reenacted verbatim the dollar-a-day provision stated in part:

> In support of the increase in the subsistence allowance and the mileage payment, the Department of Justice, in a letter printed in full below, cites the general increase in living costs and the cost of transportation since the establishment of the present rates in 1949.
>
> * * * * *
>
> Attached and made a part of this report is a letter, dated May 31, 1956, from the Department of Justice.

That letter stated in part:

> * * * The increase in these rates is recommended on the basis of the general increase in living costs and the cost of transportation which have taken place since that time. * * *

The letter then justifies the $4 per day fee (plus an additional $8 subsistence fee if the witness must remain overnight) on the basis of current hotel and meal costs. No part of this fee is justified as compensation to the witness for his lost time or income. See 1956 U.S. Code Cong. & Adm. News 3848–3850.

The present fee and subsistence levels were fixed in 1968. Originating in Sec. 102(j) of the Civil Rights Act

of 1957, 71 Stat. 634, 635, as amended,[13] Section 102(b) of the Jury Selection and Service Act of 1968, 82 Stat. 62, raised the per diem fee of witnesses from $4 to $20, the subsistence fee from $8 to $16 and the travel allowance from 8 to 10 cents per mile. The comment on the fee increases in Senate Report No. 891, 90th Cong., 1st Sess., p. 36, states:

> The subcommittee hearings established a record of unanimous support for increases that would make jury and witness service less burdensome. To the extent that the burden is diminished, hardship excuses may decline with consequent enhancement of representative participation on juries. * * *

The report then quoted from the testimony of the Chairman of the American Bar Association Section on Criminal Law, William Walsh, who had earlier urged that full compensation should be provided.[14] It

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[13] This section was not commented on in the House Report on the bill. House Report No. 1678, 89th Cong. 2d Sess., p. 22.

[14] Mr. Walsh, opposed the flat per diem fee increase to $20 which was subsequently adopted. He preferred a different proposed bill (§ 102 in S. 384) which would have provided much greater fees (Federal July Selection Hearings, Subcommittee on Improvements in Judicial Machinery, Senate Judiciary Committee, 90th Cong., 1st Sess., p. 106.):

> I would like to address myself briefly to what I consider to be omissions from most of the Bills now being considered.
>
> S. 384 provides that jurors shall receive at least the compensation which they would receive in their private employment. It is the only Bill which so provides and I feel that any statute on this subject should contain such a provision. It should not be a matter of financial sacrifice for a man to serve as a juror. Otherwise qualified jurors, whose

is thus apparent that when Congress increased the witness fees in 1968, it knowingly rejected the opportunity to provide full compensation for lost income to all witnesses (or jurors). Congress did not adopt a new approach which would have tied the per diem fee to lost income, but rather, as in the prior law, merely increased the flat fee rates of the old fee provisions, leaving unchanged its decision to "compensate" detained witnesses at the $1 per diem rate. In *Meadows v. United States Marshal*, 434 F. 2d 1007, 1008 (C.A. 5), certiorari denied, 401 U.S. 1014, the court held that Section 1821 does not authorize payment of witness fees to federal prisoners in the custody of the Attorney General since "they are not in a position similar to ordinary witnesses who must incur private costs in order to testify." That analysis is equally applicable here, and petitioners' statutory argument must therefore be rejected.

II. THE WITNESS FEE PROVISIONS OF 28 U.S.C. 1821 ARE CONSTITUTIONAL AS APPLIED TO PETITIONERS

A. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT JUST COMPENSATION BE PAID TO DETAINED WITNESSES

Any discussion of the constitutionality of paying a detained material witness only one dollar per day must begin with the underlying basis for this kind of confinement. The fundamental assumption of our

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salary would be affected by jury service, try to take advantage of other grounds for excuse from jury service when their real reason for requesting relief is economic hardship.

system of criminal justice is that, apart from legal privileges, "the public * * * has a right to every man's evidence." See *Branzburg* v. *Hayes*, 408 U.S. 665, 688, and cases cited. Because of this right of the public to insist, through the use of any appropriate form of compulsory process, that a person with evidence relevant to the ascertainment of truth be available to testify, special procedures to assure the presence of possibly recalcitrant witnesses were long ago developed. In England, the right to detain material witnesses for want of security can be traced at least as far back as 1554. See 1 & 2 Phillip & Mary, c. 13, § 5. We have seen above (page 17) that the First Congress authorized the federal courts to take steps necessary to insure that a material witness will be available to testify.

The commitment of witnesses like petitioners takes place only after there has been a judicial determination that their testimony may be material in a criminal prosecution *and* that it may be impracticable to secure their attendance by subpoena. See 18 U.S.C. 3149; Rule 46(b), Fed. R. Crim. P. And actual confinement is permissible only when there has been a determination by the court or magistrate that cash bail or security or other conditions of release "will not reasonably assure the appearance of the person as required." 18 U.S.C. 3146.[15] Petitioners have never challenged

[15] See *Stein* v. *New York*, 346 U.S. 156, 184: "The duty to disclose knowledge of crime * * * is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."

the lawfulness of their detention under these standards.

As material witnesses who were found unlikely to have been amenable to performance of their duty to testify, petitioners were not constitutionally entitled to any amount of compensation for their detention pending trial. As we have seen, Congress has from the earliest times treated the necessity for witnesses to appear in court, and, if necessary, to be detained, as a public duty and not a compensable taking requiring just compensation.[18] This Court has previously considered the matter and has sustained that approach.

In *Blair* v. *United States*, 250 U.S. 273, 281, the Court said:

> * * * By the same Act of 1853 (10 Stat. 167, 168), fees for the attendance and mileage of witnesses were regulated; and it was provided that where the United States was a party the marshal on the order of the court should pay such fees. Rev. Stats., §§ 848, 855. And §§ 870

[18] Although Judge Cranch permitted a detained witness to "prove her attendance" and be paid the general witness fee in *Higginson's Case*, 12 Fed. Cas. 132, No. 6,471 (C.A. D.C.), his action was neither in accord with the prior practice in England and the Colonies, nor adopted by Congress. 1 Opinions of the Attorney General, 344–345, 424, 430, 436–440; 23 Archives of Maryland (L) Proceedings and Acts of the Assembly 1752–1764 (1933) pp. ix, 91–92. In 1853 when Congress first authorized payment of the $1 fee to detained witnesses, it did not also deem it necessary to exclude detained witnesses from entitlement to the general witness fee. Such an exclusion would have been necessary if Judge Cranch's interpretation was correct.

and 881, Rev. Stats., contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance.

In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, [is] yet so necessary to the administration of justice according to the forms and modes established in our system of government * * *.

See also *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597.

In *New York* v. *O'Neill*, 359 U.S. 1, in upholding the validity of the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, the Court noted that the obligation to testify, though personally burdensome, has been sustained "where it necessitated travel across the Atlantic Ocean. *Blackmer* v. *United States*, 284 U.S. 421." (359 U.S. at 7; footnote omitted). The Court then added that there is "no constitutional provision granting him relief from this obligation to testify

even though he must travel to another State to do so" (359 U.S. at 11). See, also *Blackmer* v. *United States*, *supra*, 284 U.S. at 438; Note, 43 Harv. L. Rev. 121, 122 (1929).[17]

Accordingly, contrary to petitioners' claim that the unavoidable detention of material witnesses is a "taking of property," it is clear that both Congress and this Court have always regarded the necessary detention of material witnesses as a public obligation or duty, necessary to the administration of justice and the public welfare. The Just Compensation Clause of the Fifth Amendment thus does not apply to the summoning or detention of a witness pursuant to court order.[18]

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[17] In enforcing an out-of-state subpoena in *National Labor Relations Board* v. *Gunaca*, 135 F. Supp. 790, 796 (E.D. Wis.), affirmed, 230 F. 2d 542 (C.A. 6), vacated as moot, 353 U.S. 902, the district court said:

"Any time any witnesses is served with a subpoena and compelled to attend as a witness at a trial in court or a hearing before any administrative agency, federal or state, he must leave his job, and if his job pays more than the witness fee, be deprived of that much of his income. If such were a sound basis for suppressing or refusing to enforce a subpoena, no judicial or administrative proceedings of any kind could be had."

[18] The related claim that detention at one dollar per day constitutes involuntary servitude is fully answered in the opinion of the court below which points out that the government in a variety of ways impinges on individual freedom of movement without infringing the Thirteenth Amendment, and that subjection to legal process cannot be regarded as violating that amendment. Moreover, the cases we have cited in the text clearly recognize the appropriateness of detaining witnesses when necessary to the administration of justice.

B. PETITIONERS WERE NOT DENIED EQUAL PROTECTION OF THE LAWS

In the district court, we pointed out in our answer to petitioners' complaint that "[w]henever a witness who is detained in custody is in attendance in court or before a United States Commissioner or before a person authorized to take his deposition," the statute entitles him to a witness fee of $20 "for each day's attendance" (App. 23). The court of appeals interpreted the statute in conformity with this view, holding that under Section 1821 "each incarcerated and nonincarcerated witness when in attendance in court receives $20 'for each day's attendance'" (App. 45). Accordingly, there can be no question here about disparate treatment of the detained and non-detained witness regarding their actual appearance in court." The sole issue is whether a detained witness is entitled to the $20 per day stipend even though he is not in attendance in court.

Congress could rationally conclude that the class into which petitioners fall should not receive more

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[10] Petitioners now claim that they were denied the opportunity to prove that they were not paid the $20 per diem fee "on many occasions when they give statements and testify for the Government in other Administrative proceedings" (App. 32).

We note that petitioners never offered any evidence to prove the above allegation prior to filing their cross motion for summary judgment (App. 34). Furthermore, at the hearing held on December 14, 1970, the following colloquy occurred (R. 22):

> The COURT. Do you want to add anything, any evidence?
> Mr. ARMENDARIZ. No, sir.

than the $1 per day fee. As material witnesses, petitioners had a duty to appear to testify, but a judicial officer determined that the only way to assure that they would fulfill this obligation was to detain them pending trial. The government must provide for the cost of food, lodging, and security for detained witnesses, but not for other witnesses. And detained witnesses are likely to be paid for considerably more days than nondetained witnesses. For example, a payment of 30 days detention at $21 per day would be $630.00, payable whether or not the witness would otherwise have been employed or employed at that rate. As the court below pointed out (App. 45):

> * * * governmental recognition of its interest in having persons appear in court by paying them for that participation in judicial proceedings, does not require that it make payment of the same nature and extent to persons who are held available for participation in judicial proceedings should it prove to be necessary. That the government pays for one stage does not require that it pay in like manner for all stages.

Moreover the named petitioners and those they purport to represent in this class action are all persons who have illegally entered the United States (see pp. 6–11, *supra*) and thus have themselves either been defendants in criminal prosecutions or subject to deportation proceedings, or perhaps granted the privilege of voluntary departure through government leniency. In this context, petitioners and their alleged class have an especially weak claim to being victimized by economic discrimination or deprivation under

Section 1821. There is no constitutional basis that we can see for their entitlement to any compensation during a reasonable period of confinement, and it is certainly not unreasonable or irrational for Congress to authorize a minimal sum as payment to deportable aliens.* There is no indication that illegal aliens, like petitioners, even if employed, would have earned wages averaging $20 or $21 per day for a period of 30 or 60 days or longer. If their average earnings would have been less than this, payment of $21 per day would serve as a chance bonus for illegal entrants who are apprehended and held as witnesses. Such a relatively large sum could therefore have the ironic

*With application at least to aliens who are *excludable and* subject to summary deportation, Congress has provided (8 U.S.C. 1227(d)):

"(d) Stay of deportation; payment of maintenance expenses. The Attorney General, under such conditions as are by regulations prescribed may stay the deportation of any alien deportable under this section, if in his judgment the testimony of such alien is necessary on behalf of the United States in the prosecution of offenders against any provision of this chapter or other laws of the United States. The cost of maintenance of any person so detained resulting from a stay of deportation under this subsection and *a witness fee in the sum of $1 per day for each day such person is so detained may be paid* from the appropriation for the enforcement of this subchapter. Such alien may be released under bond in the penalty of not less than $500 with security approved by the Attorney General on condition that such alien shall be produced when required as a witness and for deportation, and on such other conditions as the Attorney General may prescribe. (Emphasis added.)

The first version of this statute while permitting detention of deportable aliens made no provision for a witness fee or bail (Sec. 19, Act of March 3, 1903, c. 1012, 32 Stat. 1218). The House Committee report explained Section 19 as follows (House Report No. 982, 57th Cong., 1st Sess., p. 6):

effect of encouraging attempts at illegal entry." Illegal immigration inflicts financial loss, primarily on economically disadvantaged American citizens whose jobs

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"* * * any alien rejected as a contract laborer may be detained, if such detention is necessary, to be used as a witness on behalf of the Government in any suit which may be brought against the person or persons inducing his unlawful migration to the United States, the expense of such detention to be paid from the immigrant fund. The necessity for such legislation is due to the fact that the immediate return of such an alien deprives the Government of the principal, and sometimes sole, evidence available to maintain successfully an action against the contractor, under section 5 of this bill, which is a reenactment of section 3 of the act of February 26, 1885. * * *

Section 19 was reenacted in the Act of February 20, 1907, c. 991, Sec. 19, 34 Stat. 904, and subsequently amended by Act of February 5, 1917, c. 29, Sec. 18, 39 Stat. 888, which provided for a "witness fee" of one dollar per day while deportable aliens are detained as material witnesses; the amendment also broadened the objective of detention to include testimony for the United States "in the prosecution of offenders against any provision of this Act or other laws of the United States. In 1952, this provision was reenacted as Section 237(d) of the Immigration and Nationality Act, 8 U.S.C. 1227(d). Petitioners, however, were detained pursuant to Rule 46(b) of the Federal Rules of Criminal Procedure, not the above quoted section.

[11] The "family income of 77% of the people [in Mexico] is less than $80 a month." Hearings on Illegal Aliens, Before Subcommittee No. 1 of the House Judiciary Committee, 1971, 92d Cong., 1st Sess., 1972, p. 268 (hereinafter referred to as Alien Hearings); William Hughes, General Counsel, Ciudad Juarez, Mexico, Alien Hearings, 525 stated:

"The official minimum wage in the city of Juarez prescribed by the Mexican government is $2.89 a day in the central portions of the city, and $2.52 a day in the outlying barrios, or suburban communities. We estimate that about one-third of the work force in Juarez earn the minimum wage, and at least two-thirds earn less than the minimum wage prescribed. According to the best figures furnished us by the official statistician of the State Government of Chihuahua 2 days ago, 50 percent of the heads of families in

are taken by the illegal immigrants." House Report No. 92–1366, 92d Cong., 2d Sess., pp. 3–4, based on extensive hearings, stated:

> The adverse impact of over one million illegal aliens on the employment, Federal and State public assistance programs and the United States balance of payments, is overwhelming. With respect to the impact of such aliens on the domestic labor market, one witness from the Department of Labor noted, "Our experience leads us to conclude that these illegally employed aliens:
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> 1. Take jobs which would normally be filled by American workers.
> 2. Depress the wages and impair the working conditions of American citizens.
> 3. Compete with unskilled and uneducated American citizens—the disadvantaged

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Juarez are unemployed. If you assume a typical family unit of six people, which is their figure, then you have about 86,000 family units in Ciudad Juarez, and of that group, 43,000 of the heads are unemployed."

[11] The congressional policy of requiring aliens—who because of their foreign nationality may be able to insulate themselves from the process of our courts—to post bond as a condition of entry into our country is also enforced against aliens lawfully entering the country, 8 C.F.R. 213.1, 8 U.S.C. 1102, and aliens held pursuant to a deportation proceeding, 8 U.S.C. 1252(a). If detained for want of security under 8 U.S.C. 1252 (a), the alien is not entitled to any fee.

to whom our manpower programs are directed.

4. Increase the burden on American taxpayers through added welfare costs by taking jobs which may be filled by persons on welfare, thereby thwarting our efforts to find jobs for these welfare recipients through such programs as the work incentive program.

5. Reduce the effectiveness of employee organizations.

6. Constitute for employers a group highly susceptible for exploitation."

It therefore does not "shock the conscience" that Congress has provided only a minimal "compensation" to detained deportable aliens who are held as material witnesses for a reasonably brief period of time. Whatever might be the legal consequence of the dollar per day limitation when applied to other material witnesses, petitioners and others similarly situated have little cause to protest that the statute is unfair or invidious when applied to them.

= Sheldon Greene, General Counsel, California Rural Legal Assistance, estimates the annual loss in wages to displaced California workers alone at $300 million annually. Alien Hearings 195; and see Greene, *Immigration Law and Rural Poverty—The Problems of the Illegal Entrant*, 1969 Duke L. J. 475, 478–482; *Diaz* v. *Kay-Dix Ranch*, 9 Cal. App. 3d 588, 88 Cal. Rptr. 443.

Since petitioners' constitutional arguments seeking an injunction against the operation of Section 1821 as construed and applied to them were properly treated as insubstantial by the courts below, the convening of a three-judge district court was not required. The action was correctly disposed of by a single district judge and affirmance by the court of appeals was in all respects warranted.

CONCLUSION

The judgment of the court of appeals should therefore be affirmed.

Respectfully submitted.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HURTADO ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-6742. Argued January 17, 1973—Decided March 5, 1973

1. A material witness who is incarcerated because unable to give bail is entitled under 28 U. S. C. § 1821 to the same $20 per diem compensation as is allowed a nonincarcerated witness during the trial or other proceeding at which he is in "attendance," *i. e.*, has been summoned and is available to testify in a court in session, regardless of whether he is physically present in the courtroom. Pp. 5–10.
2. The $1 statutory per diem plus subsistence in kind for incarcerated witnesses before trial does not violate the Just Compensation Clause, as detention of a material witness is not a "taking" under the Fifth Amendment; and the distinction between compensation for pretrial detention and for trial attendance is not so unreasonable as to violate the Due Process Clause of the Fifth Amendment, since Congress could determine that in view of the length of pretrial confinement and the costs necessarily borne by the Government, only minimal compensation for pretrial detention is justified, particularly since the witness has a public duty to testify. Pp. 11–13.

452 F. 2d 951, vacated and remanded to District Court.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part. DOUGLAS, J., filed a dissenting opinion.

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SUPREME COURT OF THE UNITED STATES

No. 71-6742

Felipe Juarez Hurtado et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 5, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioners, citizens of Mexico, entered the United States illegally. To assure their presence as material witnesses at the federal criminal trials of those accused of illegally bringing them into this country, they were required to post bond pursuant to Rule 46 (b) of the Federal Rules of Criminal Procedure. Unable to make bail, they were incarcerated.[1]

The petitioners instituted the present class action in the United States District Court for the Western District of Texas on behalf of themselves and others similarly incarcerated as material witnesses. Their complaint alleged that they, and the other members of their class,

[1] Rule 46 (b) of the Federal Rules of Criminal Procedure provides: "(b) Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail."

had been paid only $1 for every day of their confinement; that the statute providing the compensation to be paid witnesses requires payment of a total of $21 per day to material witnesses in custody; and that, alternatively, if the statute be construed to require payment of only $1 per day to detained witnesses, it violates the Fifth Amendment guarantees of just compensation and due process. They did not attack the validity or length of their incarceration as such, but sought monetary damages under the Tucker Act, 28 U. S. C. § 1346 (a)(2), for the lost compensation claimed, and equivalent declaratory and injunctive relief.

The statute in question, 28 U. S. C. § 1821, provides that a "witness attending in any court of the United States . . . shall receive $20 for each day's attendance and for the time necessarily occupied in going to and returning from the same . . . ." A separate paragraph of the statute entitles "a witness . . . detained in prison for want of security for his appearance, . . . in addition to his subsistence, to a compensation of $1 per day."[2]

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[2] The statute provides in full:

"§ 1821. Per diem and mileage generally; subsistence

"A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $20 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 10 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $16 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance:

The petitioners' complaint was grounded upon the theory that they were "attending in . . . court" throughout the period of their incarceration, since they were prevented from engaging in their normal occupations in order to be ready to testify. They argued that the $20 fee is compensation for the inconvenience and private loss suffered when a witness comes to testify, and that all of these burdens are borne by the incarcerated witness throughout his confinement. Urging that the compensation provisions should be applied as broadly as the problem they were designed to ameliorate, the petitioners argued that they were entitled to the $20 compensation for every day of confinement, in addition to the $1 a day that they viewed as a token payment for small necessities while in jail.

While they pressed this broad definition of "attendance," the petitioners also pointed to a narrower and more acute problem in administering the statute. Their amended complaint alleged that nonincarcerated witnesses are paid $20 for each day after they have been summoned to testify—even for those days they are not needed in court and simply wait in the relative comfort

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Provided, That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further*, That this section shall not apply to Alaska.

"When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day.

"Witnesses in the district courts for the districts of Canal Zone, Guam, and the Virgin Islands shall receive the same fees and allowances provided in this section for witnesses in other district courts of the United States."

of their hotel rooms to be called. By contrast, witnesses in jail are paid only $1 a day when they are waiting to testify—even when the trial for which they have been detained is in progress. In short, the amended complaint alleged that the Government has construed the statute to mean that incarcerated witnesses must be physically present in the courtroom before they are eligible for the $20 daily compensation, but that nonincarcerated witnesses need not be similarly present to receive that amount.[1]

In its answer, the Government conceded that each witness detained in custody is paid only $1 for every day of incarceration, and that the witness fee of $20 is paid only when such a witness is actually in attendance in court. The Goverment defended this practice as required by the literal words of the statute, and argued that the statute, as so construed, is constitutional.

In an unreported order, the District Court granted the Government's motion for summary judgment, and the Court of Appeals for the Fifth Circuit affirmed. 452 F. 2d 951. The Court of Appeals concluded that the $20 witness fee is properly payable only to those witnesses who are "in attendance" or travelling to and from court, and not to those who are incarcerated to assure their attendance. So interpreted, the Court upheld the statute as constitutional. We granted certiorari, — U. S. —, to consider a question of seeming importance in the administration of justice in the federal courts.

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[1] By way of illustration, the witness who sets out on Monday in order to be available to testify on Tuesday; but who is not actually called to the court for testimony until Friday; and who returns home on Saturday, will receive $20 for every day from Monday through Saturday. But the material witness who is incarcerated on Monday, held until Friday when he testifies, and then released, will receive one dollar for every day and an additional $20 only for Friday—the day he actually testifies.

I

Both the petitioners and the Government adhere to their own quite contrary interpretations of § 1821—the petitioners maintaining that they are entitled to a $20 witness fee for every day of incarceration and the Government seeking to limit such payment to those days on which a detained witness is physically "in attendance" in court. We find both interpretations of the statute incorrect—the petitioners' too expansive, the Government's too restricted.[4]

The statute provides to a "witness attending in any court of the United States" $20 "for each day's attendance." This perforce means that a witness can be eligible for the $20 fee only when two requirements are satisfied—when there is a court in session that he is to attend, and when he is in necessary attendance on that court.

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[4] Both parties bolster their statutory interpretations with arguments based upon the statutory language. The petitioners point out that incarcerated witnesses are not specifically excluded from those entitled to receive the $20 fee for attending court, though they are excluded from those entitled to the $16 a day subsistence allowance. Hence, they conclude that Congress intended that they be eligible for the $20 per day fee. But that argument proves no more than that Congress intended a detained witness to be eligible for the $20 fee for every day he is "attending" court; it does not indicate that Congress intended that every day of incarceration is the equivalent of a day attending court and compensable at the rate of $20 per day.

The Government supports its position by pointing out that the statute allocates to a detained witness $1 per day "in addition to his subsistence," not $1 a day in addition both to subsistence *and* to a witness fee of $20. But it is difficult to give any weight to this argument, since the Government acknowledges that a detained witness is to be paid $20 a day at least for days of physical attendance in court. Therefore, according to the Government's own interpretation, the $1 a day clause can hardly be exclusive.

The petitioners' interpretation of "attendance" as beginning with the first day of incarceration slights the statutary requirement that attendance be *in court*. A witness might be detained many days before the case in which he is to testify is called for trial. During that time there is literally no court in session in which he could conceivably be considered to be in attendance. Over a century and a half ago Attorney General William Wirt rejected a similar construction of an almost identically worded law. He found that the then-current statute, which provided compensation to a witness "for each day he shall attend in court,"[3] could not be construed to provide payment to incarcerated witnesses for every day of their detention:

> "There is no court, except it be a court in session. There are judges; but they do not constitute a court, except when they assemble to administer the law . . . . Now I cannot conceive with what propriety a witness can be said to be *attending in court* when there is *no court*, and will be *no court* for several months.
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> "To consider a witness who has been committed to jail because he cannot give security to attend a future court, to be actually *attending the court* from the time of his commitment, and this for five months before there is any court in existence, would seem

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[3] "*And be it further enacted*, That the compensation to jurors and witnesses, in the courts of the United States, shall be as follows, to wit: to each grand and other juror, for each day he shall attend in court, one dollar and twenty-five cents; and for travelling, at the rate of five cents per mile, from their respective places of abode, to the place where the court is holden, and the like allowance for returning; to the witnesses summoned in any court of the United States, the same allowance as is above provided for jurors." Act of Feb. 28, 1799, c. 19, § 6, 1 Stat. 626.

to me to be rather a forced and unnatural construction." 1 Op. Att'y Gen. 424, 427.

The Government, on the other hand, would place a restrictive gloss on the statute's requirement of necessary attendance; it maintains that the $20 compensation need be paid only for the days a witness is in actual physical attendance in court, and it concludes that a witness confined during the trial need only be paid for those days on which he is actually brought into the courtroom. But § 1821 does not speak in terms of "physical" or "actual" attendance, and we decline to engraft such a restriction upon the statute. Rather, the statute reaches those witnesses who have been summoned and are in necessary attendance on the court, in readiness to testify. There is nothing magic about the four walls of a courtroom. Once a witness has been summoned to testify, whether he waits in a witness room, a prosecutor's office, a hotel room, or the jail, he is still available to testify, and it is that availability that the statute compensates. Non-incarcerated witnesses are compensated under the statute for days on which they have made themselves available to testify but on which their physical presence in the courtroom is not required—for example, where the trial is adjourned or where their testimony is only needed on a later day.[6] We cannot accept the anomalous conclusion that the same statutory language imposes a requirement of physical presence in the courtroom on witnesses

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[6] Cf., *e. g.*, *Hunter* v. *Russell*, 59 F. 964, 967–968; *Whipple* v. *Cumberland Cotton Mfg. Co.*, 29 Fed. Cas. 933 (No. 17, 515); *Hance* v. *McCormick*, 11 Fed. Cas. 401 (No. 6, 009).

The Department of Justice regulations repeat the statutory directive that a witness is to be paid $20 for "each day's attendance." Department of Justice, United States Marshal's Manual 340.14 (1971). There is no explicit requirement of physical presence in the courtroom.

who have been confined. Attorney General Wirt concluded that language similar to that at issue here, did not require any such physical presence:

> "But it was by no means my intention to authorize the inference . . . that, in order to entitle a witness to his *per diem* allowance under the act of Congress, it was necessary that he should be every day *corporeally present* within the walls of the court-room, and that the court must be every day in actual session. Such a puerility never entered my mind. My opinion simply was, and is, that before compensation could begin to run, the court must have commenced its session; the session must be legally subsisting, and the witness attending on the court—not necessarily in the court-room, but within its power, whenever it may require his attendance . . . . . I consider a witness as attending on court to the purpose of earning his compensation, so long as he is in the power of the court whensoever it may become necessary to call for his evidence, although he may not have entered the court-room until such call shall have been made; and I consider the court in session from the moment of its commencement until its adjournment *sine die*, notwithstanding its intermediate adjournments *de die in diem*." 1 Op. Att'y Gen. 424, 426–427.

We conclude that a material witness who has been incarcerated is entitled to the $20 compensation for every day of confinement during the trial or other proceeding for which he has been detained.[1] On each of those days,

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[1] The legislative history of the compensation provision is unenlightening. Though Congress early provided compensation for witnesses attending in the courts of the United States, no specific provision was made for incarcerated witnesses. See, *e. g.*, Act of May 8, 1792, c. 36, § 3, 1 Stat. 277; Act of June 1, 1796, c. 48,

the two requirements of the statute are satisfied—there is a court in session and the witness is in necessary attendance. He is in the same position as a nonincarcerated witness who is summoned to appear on the first

§ 2, 1 Stat. 492; Act of February 28, 1799, c. 19, § 6, 1 Stat. 626. In 1853 Congress provided for payment to a witness of $1.50 a day while attending court, and specifically indicated that a detained witness was to be paid a dollar a day over and above his subsistence. Act of Feb. 26, 1853, c. 80, § 3, 10 Stat. 167. In 1926 Congress eliminated the specific provision for compensation to detained witnesses and raised the per diem compensation for attendance in court. Act of April 26, 1926, c. 183, §§ 1–3, 44 Stat. 323–324.

In the following two decades, Congress changed the levels of compensation but did not specifically provide for compensation to detained witnesses. See Act of June 30, 1932, c. 314, § 323, 47 Stat. 413; Act of March 22, 1935, c. 39, § 3, 49 Stat. 105; Act of December 24, 1942, c. 825, § 1, 56 Stat. 1088. When the Judicial Code was revised in 1948, the provision for per diem compensation to detained witnesses was again absent. Act of June 25, 1948, c. 646, § 1821, 62 Stat. 950, but was added the following year, Act of May 24, 1949, c. 139, § 94, 63 Stat. 103, with the explanation by the House Committee on the Judiciary that it had been "inadvertently omitted." H. R. Rep. No. 352, 81st Cong., 1st Sess. 16. By a separate measure witness fees were increased. Act of May 10, 1949, c. 96, 63 Stat. 65. While the per diem fee, the subsistence fee, and the travel allowance have all been increased, the $1 a day for incarcerated witnesses has remained constant. See Act of August 1, 1956, c. 826, 70 Stat. 798; Act of March 27, 1968, Pub. L. No. 90-274, § 102 (b), 82 Stat. 62.

The petitioners urge that this history of steadily increasing fees at least indicates a congressional intent to compensate witnesses fully for their lost time and income, and that since they suffer these losses throughout the period of incarceration they ought to receive the $20 for every day of confinement. But Congress recognized that witness fees could not fully compensate witnesses for their lost time or income. See, *e. g.*, S. Rep. No. 891, 90th Cong., 1st Sess. 36; S. Rep. No. 187, 81st Cong., 1st Sess. 2. The petitioners point to no hint in any of the reports on the various changes in compensation levels which could justify the conclusion that Congress intended to provide more than one dollar a day to detained witnesses for the period of their pretrial confinement.

day of trial, but on arrival is told by the prosecutor that he is to hold himself ready to testify on a later day in the trial. The Government pays such a witness for every day he is in attendance on the court, and the statute requires it pay the same per diem compensation to the incarcerated witness. Because the Court of Appeals upheld a construction of the statute that would allow the $20 to be paid to incarcerated witnesses only for those days they actually appear in the courtroom, its judgment must be set aside.*

II

The petitioners argue that if § 1821 provides incarcerated witnesses only a dollar a day for the period before the trial begins, then the statute is unconstitutional. We cannot agree.

As noted at the outset, the petitioners do not attack the constitutionality of incarcerating material witnesses, nor the length of such incarceration in any particular

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*It was also error to affirm the summary judgment for the Government because there was a genuine issue of material fact whether the petitioners had ever been paid for the days that they actually attended court. See Fed. Rule Civ. Proc. 56 (c); *Arenas* v. *United States* 322 U. S. 419, 432–434; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 623–629. They alleged in their amended complaint that on many occasions they testified for the Government and were not paid $20 a day for such testimony. The Government agreed that they were entitled to that compensation, but contended in its answer that they had been so paid. No affidavits or other evidence were submitted to support that contention, and the Court of Appeals in affirming summary judgment for the Government did not comment on this clear factual dispute.

Since a remand is required, we also note that the District Court never explicitly ruled on the petitioners' motion to have this suit declared a class action under Rule 23 of the Federal Rules of Civil Procedure, and the Court of Appeals did not discuss the issue. It will, of course, be appropriate on remand for the District Court to determine whether this suit was properly brought as a class action, and we accordingly express no view on that issue.

case.[9] Rather, they say that when the Government incarcerates material witnesses, it has "taken" their property, and that one dollar a day is not just compensation for this "taking" under the Fifth Amendment. Alternatively, they argue that payment of only one dollar a day before trial, when contrasted with the $20 a day paid to witnesses attending a trial, is a denial of due process of law.

But the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed. See *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 193 (modification of bridge obstructing river); *United States* v. *Hobbs*, 450 F. 2d 935 (Selective Service Act); *United States* v. *Dillon*, 346 F. 2d 633, 635 (representation of indigents by court-appointed attorney); *Rodenko* v. *United States*, 147 F. 2d 752, 754 (alternative service for conscientious objectors); cf. *Kunhart & Co.* v. *United States*, 266 U. S. 537, 540. It is beyond dispute that there is in fact a public obligation to provide evidence, see *United States* v. *Bryan*, 339 U. S. 323, 331; *Blackmer* v. *United States*, 284 U. S. 421, 438, and that this obligation persists no matter how financially burdensome it may be.[10] The financial losses suffered during pretrial detention are an extension of

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[9] See *Stein* v. *New York*, 346 U. S. 156, 184 ("The duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."); *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 616–618.

[10] "[I]t may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-required favor. It is a duty not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities and become a hermit. He who will live by society must let society live by him, when it requires to." 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961).

the burdens borne by every witness who testifies. The detention of a material witness, in short, is simply not a "taking" under the Fifth Amendment, and the level of his compensation, therefore, does not, as such, present a constitutional question. "[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being summoned, and for the performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair* v. *United States*, 250 U. S. 273, 281.[11]

Similarly, we are unpersuaded that the classifications drawn by § 1821 as we have construed it are so irrational as to violate the Due Process Clause of the Fifth Amendment. Cf. *Bolling* v. *Sharpe*, 347 U. S. 497, 499. The statute provides $20 per diem compensation to a witness who is in necessary attendance on a court, but that fee is payable to any witness, incarcerated or not. During the period that elapses before his attendance on a court, a witness who is *not* incarcerated gets no compensation whatever from the government. An incarcerated witness, on the other hand, gets one dollar a day during that period, in addition to subsistence in kind.

We cannot say that there is no reasonable basis for distinguishing the compensation paid for pretrial detention from the fees paid for attendance at trial. Pretrial confinement will frequently be longer than the period of attendance on the court, and throughout that period of confinement the Government must bear the cost of

[11] There is likewise no substance to the petitioners' argument that the dollar a day payment is so low as to impose involuntary servitude prohibited by the Thirteenth Amendment. Cf. *Griffin* v. *Breckenridge*, 403 U. S. 88, 104–105; *Jones* v. *Alfred H. Mayer*, 392 U. S. 409, 437–444.

food, lodging, and security for detained witnesses. Congress could thus reasonably determine that while some compensation should be provided during the pretrial detention period, a minimal amount was justified, particularly in view of the fact that the witness has a public obligation to testify. As the Court of Appeals correctly observed, "[G]overnmental recognition of its interest in having persons appear in court by paying them for that participation in judicial proceedings, does not require that it make payment of the same nature and extent to persons who are held available for participation in judicial proceedings should it prove to be necessary. That the government pays for one stage does not require that it pay in like manner for all stages." 452 F. 2d, at 955.

We do not pass upon the wisdom or ultimate fairness of the compensation Congress has provided for the pretrial detention of material witnesses. We do not decide "that a more just and humane system could not be devised." *Dandridge* v. *Williams*, 397 U. S. 471, 487. Indeed, even though it opposed granting the petition for certiorari in the present case, the Government found it "obvious" that "the situation is not a satisfactory one," and we were informed at oral argument that a legislative proposal to increase the per diem payment to detained witnesses will shortly be submitted by the Department of Justice to the Office of Management and Budget for review. But no matter how unwise or unsatisfactory the present rates might be, the Constitution provides no license to impose the levels of compensation we might think fair and just. That task belongs to Congress, not to us.

The judgment of the Court of Appeals is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 71-6742

Felipe Juarez Hurtado et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 5, 1973]

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

I am in full agreement with much of the majority's opinion. Construing 28 U. S. C. § 1821, which authorizes compensation at the rate of $20 per day to "[a] witness attending in any court of the United States . . . ," the Court holds today that a person held in jail as a material witness[1] is "attending in" court each day that the pertinent judicial proceeding is underway, even if the witness is not physically present in the courtroom. But the majority also holds that a jailed witness is not "attending in" court prior to the inception of the judicial proceeding, even though he is held in custody for no other purpose than to insure his appearance to give testimony at trial. I reject that conclusion because, in my view, it works an obvious and severe hardship on an incarcerated witness, because it is compelled neither by the language nor the purposes of the statute, and because the statute so construed would be unconstitutional under the Due Process Clause of the Fifth Amendment.

[1] Fed. Rule Crim. Proc. 46 (b) provides that where a witness' testimony is "material" in any criminal proceeding and where it may become impracticable to secure the presence of the witness by subpoena, the court may require the witness to give bail for his appearance. If the witness fails to give bail the court may order his incarceration pending final disposition of the proceeding in which his testimony is needed.

I

In addition to providing compensation of $20 per day for "each day's attendance and for the time necessarily occupied in going to and returning from" the court where the witness is to testify, the statute also authorizes, in certain cases, an "additional allowance of $16 per day for expenses of subsistence." 28 U. S. C. § 1821. And the same statute states that "[w]hen a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day."

In construing these statutory provisions, petitioners (citizens of Mexico who entered the United States illegally), respondent, and the Court agree on two points: first, that a jailed material witness is entitled to compensation of $1 per day for each day that he spends in confinement; and second, that a jailed material witness is entitled to the additional compensation of $20 per day for each day that a trial is in progress and that the witness is physically present in the courtroom. The point in contention is whether or not the jailed witness should receive the additional compensation of $20 per day during the time after he is taken into custody, but before he is physically present in court. Petitioners contend that he should. Respondent contends that he should not. The Court holds that he *should* receive the compensation for each day that the trial is in progress (whether or not he actually appears in court), but that he *should not* receive it for the days spent in custody before the trial is underway.

The Court predicates its conclusion on a superficially plausible reading of the literal terms of the statute:

> "The petitioners' interpretation of 'attendance' as beginning with the first day of incarceration slights the statutory requirement that attendance be *in*

> *court.* A witness might be detained many days before the case in which he is to testify is called for trial. During that time there is literally no court in session in which he could conceivably be considered to be in attendance." *Ante*, at 6.

The Court holds, in other words, that if the court is not in session, then a jailed material witness cannot be said to be "attending *in* . . . *court*." But the correct interpretation of the phrase, "in court," is not as obvious as it would at first appear. Read literally, the phrase would appear to require that the witness spend the day within the four walls of the courtroom, or, at the very least, the courthouse. Yet the Court recognizes, and the Government concedes, that a witness can be "in court" even if he is in a hotel room or a restaurant. I share the view that physical presence in the courtroom is not required to bring a witness within the reach of the statute. But I cannot accept the Court's conclusion that a witness is "in court" or not "in court," depending on whether or not the judicial proceeding is technically underway.

Unfortunately, the Government has not described its practice in compensating witnesses under § 1821 with the kind of specificity that would simplify our analysis. It would seem plausible, however, to assume that the practice might be as follows: A witness subpoenaed to appear on Tuesday morning may spend all of Monday in route to the courthouse, only to learn on Tuesday that the case will not be called as early as expected. If the witness waits in the witness room all day each day until the case is finally called on Friday, it would seem reasonable to assume that he is entitled to compensation for his attendance on Tuesday, Wednesday, and Thursday, even though the proceeding did not begin until Friday. Whatever the Government's practice in such a case, I would hold that the payment of compensation for those three days would be permitted, if not required, by the

terms of the statute. Yet under the Court's rigid analysis of the phrase, "in court," it would be unlawful for the Government to compensate the witness, except for the days spent travelling to and from the courthouse, for any day except Friday. The Court is apparently bound to hold that notwithstanding the physical presence of the witness in the courthouse, he was not "in court" because the court was not yet in session.

The obvious shortcoming of the Court's analysis is its disregard, in construing the critical statutory phrase, of the purposes of the statute. The statute is grounded on the view that a subpoena to appear and give testimony will often entail substantial disruption of one's affairs, a loss of income, and considerable inconvenience. These dislocations, for which Congress has authorized compensation,[2] will exist whether a witness is required to wait in a witness room, a prosecutor's office, a courtroom, or a hotel room. For that reason the Court is correct in its conclusion that a witness may be "in court" for the purposes of the statute even though he is not, in fact, in the courthouse. But that same purposive analysis refutes the Court's suggestion that the pendency of a judicial proceeding is a precondition to the payment of witness fees. Surely the fact that the court is not yet in session is small comfort to the witness who is required to appear and wait for the calling of his case. His daily loss of income does not mysteriously increase as soon as the judge appears behind the bench. Nor, if he is unlucky enough to be held in custody for want of bail, does the

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[2] The Government argues at length that Congress did not intend to provide full compensation to a witness or to insure the witness against all lost earnings. See Brief for Respondent, at 16–24. The Government does not dispute, however, that the congressional purpose was to provide at least partial compensation for the expenses, dislocation, and income loss attendant to compelled attendance as a witness.

infringement on his liberty become less burdensome or the assault on his dignity less severe. Whatever the status of the judicial proceeding, it remains clear that the witness is held in jail for a single purpose: to serve the interests of the court. And it is the unquestioned purpose of the statute to insure that witnesses who are inconvenienced to serve the interests of the court are compensated, at least in part, for the service they have given. I cannot ascribe to Congress the essentially irrational view that a day spent in attendance on a pending trial is inherently a day more worthy of compensation than a day spent in attendance on a trial that is not yet underway. Nothing should or was intended to turn on whether a trial is actually in progress.

II

My conclusion that the majority has misconstrued the statute is fortified by the conviction that the statute, as interpreted by the Court, would be invalid under the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). The majority discerns a

> "reasonable basis for distinguishing the compensation paid for pretrial detention from the fees paid for attendance at trial. Pretrial confinement will frequently be longer than the period of attendance on the court, and throughout that period of confinement the Government must bear the cost of food, lodging, and security for detained witnesses. Congress could thus reasonably determine that while some compensation should be provided during the pretrial detention period, a minimal amount was justified, particularly in view of the fact that the witness has a public obligation to testify." *Ante*, at 12–13.

In my view, that assertion is inadequate to the task of justifying this discriminatory classification scheme. First, as construed by the Court the scheme clearly does not treat jailed material witnesses in a manner which is in any sense equivalent to the treatment of subpoenaed witnesses. Rather, the Court establishes two distinct classes of inconvenienced witnesses: those who are burdened by a subpoena to appear—who receive compensation for each day of dislocation; and those who are burdened by a term in jail—who are compensated only for the days of dislocation which follow the inception of trial. The Court apparently denies this inequality, asserting that "[d]uring the period that elapses before his attendance on a court, a witness who is *not* incarcerated gets no compensation whatever from the government. An incarcerated witness, on the other hand, gets one dollar a day during that period, in addition to subsistence in kind." *Ante*, at 12. But the appropriate point of comparison is not the treatment of incarcerated witnesses before trial with the treatment of nonincarcerated witnesses before trial. The statement that a subpoenaed witness receives no compensation for the period which precedes the onset of trial is true but irrelevant. Naturally the witness receives no compensation; he has sustained no injury. By hypothesis, the subpoena directs the witness to appear at a time when trial is at least scheduled to begin. In practical effect, therefore, the subpoenaed witness is compensated in full for each day of inconvenience, while the jailed witness may endure the "inconvenience" of a lengthy term in jail and receive significant compensation only for the days of confinement which happen to coincide with trial.

Moreover, this discrimination against jailed witnesses cannot be justified by reference to the fact—again, true but irrelevant—that the "witness has a public obligation to testify." *Ante*, at 13. The identical "public obligation" is imposed on the subpoenaed witness, and the

existence of the obligation does not rationalize the heavier burden placed on the jailed witness in seeking compensation for his days of dislocation. And since the jailed witness carries the same obligation to testify both before and after trial has begun, its existence does not explain a scheme that provides significant compensation only for days of confinement during trial.

If the statutory scheme is to be upheld, it can only be on the theory that Congress has made a rational attempt to impose some limits on the amount of money which will be paid out to any given witness under the scheme. I can assume that the imposition of such a ceiling on expenditures is, in itself, a permissible goal. And since witness fees could, in some instances, reach staggering amounts, I can assume that Congress has the power to impose an across-the-board cutoff—*e. g.*, $1,000 per witness—on the fees allowable under the act. But these assumptions do not relieve us of the obligation to determine whether the particular approach Congress has used in imposing a cutoff is sufficiently rational to withstand constitutional attack. Cf. *Dandridge* v. *Williams*, 397 U. S. 471, 483–487 (1970). I conclude that it is not.

As the Court construes the statutory scheme, a material witness who is held in jail for four months in anticipation of a one-day trial will receive in compensation $141—$1 per day for each of 120 days, and $21 for the day of trial. By contrast, a witness who is subpoenaed to appear on the first day of trial but who, as a result of preliminary motions, adjournment, and miscellaneous delays, is not called to appear until two weeks have passed, will receive $280 in compensation, plus a subsistence allowance. However legitimate the governmental interest in imposing some limit on the expenditure of money to witnesses, the mere assertion of that interest cannot save a classification scheme that pays to a witness who spends two weeks in a hotel a sum of money greatly in

excess of the amount made available to one who spends four months in the less congenial atmosphere of a courthouse jail. I can see no rational basis for this appalling difference in treatment.[3]

The classification scheme we uphold today cannot be considered a rational attempt to preserve the Government's financial resources.[4] Regrettably, it seems to

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[3] Of course, where the Government detains a material witness pending trial, its total financial burden is not limited to the payment of $1 per day under 28 U. S. C. § 1821. The Government also assumes the expense of feeding and housing the incarcerated witness. Nevertheless, I cannot conclude that this added expense affords a rational basis for imposing an arbitrary ceiling on the payment of witness fees to a jailed witness. First, the Government makes no attempt to justify the statute on this ground, and we are not advised of the marginal cost to the Federal Government of holding a material witness in an existing penal facility. Second, the legislative history of the scheme evidences no particular congressional concern for the costs of incarceration, nor any effort to limit the payment of witness fees because of this added expense. Third, even if the marginal costs of incarceration are substantial, that fact cannot explain the absence of any limits whatsoever on the witness fees that can be paid to a nonincarcerated witness. And since a nonincarcerated witness may be eligible for a subsistence allowance of $16 per day in addition to the $20 daily fee, the amount of money involved can be very large indeed. Finally, and most important, while the Government has an obvious interest in limiting its total expenditure on witnesses—including the payment of fees, subsistence allowances, and incarceration costs—that interest cannot explain the payment of higher per diem fees to nonincarcerated witnesses than to incarcerated witnesses. Even if the cost of keeping a witness in jail is $36 per day, which is the amount paid each day to a nonincarcerated witness, it does not follow that the payments are equivalent from the standpoint of the witnesses. The jailed witness is inconvenienced no less than the subpoenaed witness, yet his rate of compensation is dramatically, and inexplicably, less.

[4] Nor can the scheme be justified on the theory that one who is too poor to give bail deserves only minimal compensation because he is unlikely to incur any great financial loss during the period of incarceration. The fact that a witness is unable to give bail is hardly an indication that he is unemployed. In any case, the statute is

me little more than an attempt to punish those who are unable to give bail as a guarantee of their appearance at trial, and who, almost by definition, lack the power and resources to remedy their unfortunate plight. As my Brother DOUGLAS points out "[w]e cannot allow the Government's insistent reference to these Mexican citizens as 'deportable aliens' to obscure the fact that they come before us as innocent persons who have not been charged with a crime or incarcerated in anticipation of a criminal prosecution." *Ante*, at 5. They have been held in custody only to insure their presence at trial. I would not impute to Congress an intent to penalize these petitioners by holding the injury they have suffered less worthy of compensation than the inconvenience to a witness who is subpoenaed to appear at trial. I would hold, consistently with a fair reading of the statute in light of its purposes, that petitioners are entitled to compensation at the rate of $21 per day for each day they spend in custody while awaiting the call to appear in court.

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designed to compensate the witness not only for the loss of income, but also for the inconvenience and disruption of his personal affairs. Inconvenience is not the exclusive property of the rich. Moreover, the witness who cannot give bail is likely to be the one most in need of compensation to pay the expenses his family will inevitably incur while he waits in jail for the beginning of trial. As enacted by Congress, the scheme was thought to provide compensation in an amount that is "more or less arbitrary, but considered to be reasonably fair to the average witness." S. Rep. No. 187, 81st Cong., 1st Sess. There is no indication that Congress thought some witnesses were so poor that they could be deemed indifferent to compensation.

Thus, the Government's assertion that "payment of $21 per day would serve as a chance bonus" for persons like petitioners who presumably earn less than that amount per day, Brief for Respondent, at 31, misses the point of the statutory scheme. By that reasoning, the scheme would offer the same "chance bonus" to a witness who earns $50,000 per year, but who is not required to perform a daily service to earn that income. Wealth is not a guarantee that income loss is substantial, just as poverty is not a guarantee that the income loss is trivial.

SUPREME COURT OF THE UNITED STATES

No. 71-6742

Felipe Juarez Hurtado et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 5, 1973]

MR. JUSTICE DOUGLAS, dissenting.

In my view, petitioners, all indigents, have been subject to discrimination "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U. S. 497.

Petitioners, citizens of Mexico allegedly brought into the United States illegally, belong to that class of persons who as material witnesses can be subpoenaed to testify. Each must suffer at least limited invasion of his personal liberty to fulfill his public obligation to provide evidence. See *United States* v. *Bryan*, 339 U. S. 323, 331; *Blair* v. *United States*, 250 U. S. 273, 281. Petitioners, however, also belong to a discrete subclass—those whose presence it might be impractical to secure by subpoena and thus are subject to detention pursuant to Rule 46 (b) [1] if they cannot post bail. The depriva-

[1] Rule 46 (b) reads:

"Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceedings in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail."

tion they suffer is longer and more extensive than that of the witness merely subject to a subpoena. They may spend months in jail awaiting the few minutes or hours they will spend testifying. Unlike other witnesses, they are not free to come or go while the trial is not actually in progress. Nevertheless, the justification for infringing their liberty remains the same. Rule 46 (b) was conceived as a tool [2] to insure that the witness is available to testify, and any time spent incarcerated is spent as a direct result of the obligation that burdens all material witnesses. The comparison we are concerned with, then, is between the compensation paid to the incarcerated witness during the entire period his freedom to come or go is curtailed and the compensation paid to a nonincarcerated witness during the entire period he is subject

[2] Mr. Justice Black and Mr. Justice Frankfurter dissented from submission of the original Rules of Criminal Procedure as noted in our Journal of Dec. 26, 1944.

Justice Black and I in 1966 opposed the submission of certain amendments to the Rules of Criminal Procedure to the Congress. Justice Black's statement is to be found in 383 U. S. 1032, mine in 383 U. S. 1069. We thought at the time that some of the amendments presented serious constitutional questions.

The fact that the Court approved the Rules without reading them or debating them or weighing their merits does not of course preclude a challenge to their constitutionality in a given case.

But the imprimatur of this Court is on the Rules, and that gives them mighty weight. It is possible to read Rule 46 (b) as permitting release on personal recognizance. But experience has shown that judges do not so read it. The result, as I indicate in this opinion, is that Rule 46 (b) bears down heavily on indigents who are good risks but cannot put up the money to buy a bail bond. Rule 46 (b) as so construed—and as applied in the present case—is therefore plainly unconstitutional. Filling of jails of San Antonio with men whose only crime is the desire to find work and holding them there at the caprice of the prosecutor is shocking, to say the very least—and traceable to the easy, offhand way in which the Court has seemingly approved many Rules which touch not only matters of public security but individual liberties as well.

to restraint. Although it is true, as the majority notes, that the nonincarcerated witness is paid nothing at all while court is not in session, the two classes are hardly comparably situated at the time, for the nonincarcerated witness is not subject to any substantial restraint as a result of his subpoena.

Congress has seen fit to compensate all material witnesses at the per diem rate of $20 for each day's attendance "in any court" (as defined by the majority) and for the necessary travel time. 28 U. S. C. § 1821. Yet, Congress compensates those incarcerated pursuant to Rule 46 (b) at the per diem rate of only $1. Thus, not only are petitioners subject to more extensive deprivation of personal freedom, they also are denied equivalent compensation while waiting to testify.[3] Because Rule 46 (b) provides that only witnesses who fail to post bail may be incarcerated, this discrimination in practice affects just the indigent and results, therefore, in a suspect classification based upon wealth. This invidious dis-

[3] The Solicitor General asserts that "it is certainly not unreasonable or irrational for Congress to authorize a minimal sum as payment to deportable aliens. There is no indication that illegal aliens, like petitioners, even if employed, would have earned wages averaging $20 or $21 per day for a period of 30 or 60 days or longer." This prompts two comments. In explaining a predecessor of the current statute, the Senate Report stated:

"The amounts arrived at in this bill are considered to be more fair than presently existing amounts, although it is recognized that certain witnesses will not, under the proposed rates, be adequately compensated. In order to fairly compensate everyone appearing as a witness it would be necessary to have either a graduate scale of fees, or, leave the amount of such fees in the discretion of the judge. Neither was considered feasible, and therefore the amounts arrived at herein are more or less arbitrary, but considered to be reasonably fair to the average witness." S. Rep. No. 187, 81st Cong., 1st Sess.

Also, if the statute is to be measured as it applies to aliens, it surely creates a suspect classification. See *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410.

crimination against the poverty-stricken cannot be supported by some speculative rational justification. *Ortwein* v. *Schwab*, — U. S. —, — (DOUGLAS, J., dissenting); *United States* v. *Kras*, 409 U. S. —, — (DOUGLAS, J., and BRENNAN, J., dissenting); *Boddie* v. *Connecticut*, 401 U. S. 371 (DOUGLAS, J., concurring). Surely, the Government's desire to avoid the costs of compensation in addition to the increased costs of food, lodging, and security does not rise above that level.[4] See *Boddie* v. *Connecticut*, *supra*, at 382; *Shapiro* v. *Thompson*, 394 U. S. 618, 633.

The majority "cannot say that there is no reasonable basis for distinguishing the compensation paid for pretrial detention from the fees paid for attendance at trial." I am not certain I can agree even with that position. The magic transition period under the statute[5] as construed by the majority is the beginning of trial. I find the distinction wholly arbitrary. I do not see how it bears any relevance to the quality of confinement; petitioners sacrifice their time waiting to testify whether or not court is in session.

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[4] For each day the Government compensates a witness at the per diem rate of $20, it also pays the witness $16 to cover subsistence expenses. I cannot believe that it costs the Government more than $16 a day to feed an incarcerated witness. In any event, the witness should not be taxed when he is imprisoned for the convenience of the Government.

[5] The majority tracks the legislative history of § 1821 and concludes that it is "unenlightening." When compensation was first paid to incarcerated witnesses in 1853, Act of Feb. 6, 1853, c. 80, § 3, 10 Stat. 167, they were paid $1 per day, or 50¢ less than a witness merely attending court. No subsistence was paid, and we can assume that the differential related to this factor. Over the years, Congress has increased the compensation paid to material witnesses and added subsistence payments without increasing the compensation paid to incarcerated witnesses. Congress has not advanced any justification.

Griffin v. *Illinois*, 351 U. S. 12, held that an indigent defendant is denied equal protection of the law if he is barred from appealing on equal terms with other defendants solely because of his indigence. In *Bandy* v. *United States*, 7 L. Ed. 2d 9, I concluded that "no man should be denied release [pending trial or judicial review] because of his indigence." *Id.*, at 11. This principle seems ever clearer and more forceful to me in circumstances where the imprisoned have not been charged with or convicted of a crime. We cannot allow the Government's insistent reference to these Mexican citizens as "deportable aliens" to obscure the fact that they come before us as innocent persons who have not been charged with a crime or incarcerated in anticipation of a criminal prosecution. It is true, of course, that petitioners do not challenge the constitutionality of confining a material witness. But, in their prayer for relief they seek to enjoin the Government "from any further incarceration of any person under such rule under the present interpretation of 1821 at one dollar ($1.00) per day total payment." I conclude that petitioners are entitled to this relief unless they are released on their personal recognizance.

END OF CASE